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ARTICLES

AN ENVIRONMENTAL AUDIT PRIVILEGE: WHAT PROTECTION REMAINS AFTER EPA'S REJECTION OF THE PRIVILEGE?

Ellen Page DelSole*

As the government imposes broader regulation on industry activities affecting the environment, companies must assess the extent to which they can perform environmental audits, internal investigations of environmental problems, in order to seek solutions without leaving the information they discover open to parties who might have claims against them.¹ While environmental audits are recognized as an effective, proactive means to avoid environmental liabilities,² they also threaten to form

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1. The issue of protection for environmental audit materials often arises in the context of environmental compliance audits aimed at evaluating a business's present activities to assess compliance with environmental laws and regulations. See Richard S. Baron & Christopher J. Valeriote, *Environmental Audits—What Are They and Can the Results be Kept Confidential?*, 73 MICH. B.J. 1048, 1049 (1994). Additionally, internal environmental audits include what some commentators have referred to as "management audits," which examine a corporation's systems and procedures to ensure that procedures are in place to provide an adequate check on environmental compliance. See Paula C. Murray, *The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA*, 24 REAL EST. L.J. 169, 170 (1995); see also Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) (defining environmental auditing as "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements"). The privilege protection for environmental audits discussed in this Article focuses primarily on audits to assess compliance with environmental laws and regulations, "management audits," and other internal investigations. Environmental audits also may occur, however, in the transactional context, where a company is evaluating the activities or property of another entity prior to a merger, acquisition, or real estate purchase. See Baron & Valeriote, *supra*, at 1048. The same protections may extend to this latter context depending upon the particular circumstances of the audit and whether it can be considered an internal self-evaluation within the meaning of the applicable law. See *id.* at 1048-49 (discussing additional defenses available to parties utilizing transactional audits in business deals).

2. See Baron & Valeriote, *supra* note 1, at 1050. Indeed, the Environmental Protection Agency (EPA) touts its environmental enforcement programs as having "contributed to the dramatic expansion of environmental auditing measured in numerous recent

a roadmap for environmental prosecution or civil liability.³ Absent some protection to guarantee the confidentiality of environmental audit materials, industry has good reason for concern that audit results could prove a valuable weapon for a range of potential claimants. Such claimants include not only state and federal government agencies, which might assert claims in the context of either criminal enforcement or civil fines and cleanup actions, but also private parties and citizens' groups who might decide to bring suit; such information might also increase success in litigating existing claims.⁴

This quandary brings decisively to the forefront of industry's concerns the question whether, and to what extent, a privilege exists to protect environmental audit materials. In recent years legislators and a few courts have begun to recognize a privilege for environmental audit materials. Specifically, a number of states have enacted statutes to protect environmental audit materials, and still more have bills under consideration;⁵ comparable federal bills have been introduced in Congress.⁶ Federal courts for the first time have recognized a privilege for

surveys." Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,707 (1995) [hereinafter EPA Final Policy]. The EPA has further observed that, because of limited agency resources, maximum compliance cannot be achieved "without active efforts by the regulated community to police themselves." *Id.* Moreover, it has been argued that for an environmental audit to be effective in furthering compliance it cannot be a veiled report designed to do minimal harm if disclosed. See James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119, 121 & n.10 (1994) (citing ENVIRONMENTAL PROTECTION AGENCY, AUDITING PUBLIC MEETINGS (July 27-28, 1994), and noting that speakers from industry "reiterated that internal candor is essential, and is being diminished by concerns about disclosures"). Rather, the audit report must be strong, brutally honest, and blunt in order to convince corporate level managers to invest in environmental upgrading to avoid potential future civil or criminal action. See *id.*

3. See Thomas B. Johnston & Charles N. Schilke, *State Audit Privilege Laws and EPA's New Auditing Policy: The Effect on the Decision to Audit*, 5 EPA ADMIN. L. REP. 619, 619 (1995); see also Baron & Valeriote, *supra* note 1, at 1050.

4. In addition to concerns about privilege protection in government civil and criminal enforcement actions and actions brought by third parties, commentators have observed that management should be particularly concerned about disclosures by its own employees acting as whistleblowers and suing as "private attorneys general" under the citizen suit provisions afforded by several environmental statutes. See James R. Arnold, *Disclosure of Environmental Liabilities to Government Agencies and Third Parties*, in THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE AND OTHER COMMERCIAL TRANSACTIONS, at 381, 430 (1995) (ALI-ABA Course of Study CA47), available in Westlaw, ALI-ABA Database.

5. For a summary of bills under consideration, illustrating the vast amount of legislative activity in this area see generally *State Lawmakers Weigh Merits of Environmental Audit Bills*, State Env't Daily (BNA) (Apr. 19, 1996), available in LEXIS, BNA Library, BNASED File.

6. See, e.g., S. 582, 104th Cong. (1995) (providing, under federal law, a limited privilege from disclosure of information acquired pursuant to a voluntary environmental self-

environmental audits in some limited litigation contexts, applying either the traditional privileges of attorney-client privilege and work product or, in one case, applying the self-evaluative privilege more recently developed as part of the common law of privilege.⁷ Thus, defendants in environmental actions have had access to a viable argument that a privilege should apply to protect environmental audits in federal and state courts. The Environmental Protection Agency (EPA), however, recently endeavored to put a lid on privilege expansion with its announcement of a Final Policy on self-policing that refused to recognize a privilege for environmental audits.⁸

This Article discusses the contexts in which there was growing recognition of an environmental audit privilege, including the scope of that protection, prior to EPA's policy determination that it would not recognize such a privilege. Next, this Article addresses EPA's Final Policy, its anticipated effect on industry practices, and its impact on the developing law of privilege protection for environmental audits. Because of the public interest in expansion of the privilege in the environmental context to ensure confidentiality, which is hoped to further correction of environmental problems through voluntary self-evaluation,⁹ EPA's rejection of a privilege may not spell doom for development of environmental audit privilege protection. There remains, however, a clear tension between advocates of privilege for environmental audits who argue that the laws

analysis and, if such information is voluntarily disclosed, limited immunity from penalties); H.R. 1047, 104th Cong. (1995) (same); S. 2371, 103d Cong. (1994) (providing that environmental audit reports will not be subject to discovery, nor "admitted into evidence in any civil, criminal, or administrative proceeding before a Federal court or agency").

7. See *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252 (3d Cir. 1993) (work product doctrine); *Olen Properties Corp. v. Sheldahl, Inc.*, 38 Env't Rep. Cas. (BNA) 1887 (C.D. Cal. 1994) (attorney-client privilege); *Reichhold Chems., Inc. v. Tectron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994) (self-evaluative privilege).

8. See EPA Final Policy, *supra* note 2, at 66,706; see also Cheryl Hogue, *State Privilege Legislation Multiplies in 1995; Predictions Differ About 1996*, 19 Chem. Reg. Rep. (BNA) No. 22, at 573, 573-74 (Sept. 1, 1995).

9. See Daniel Riesel & Michael D. Zarin, *Environmental Action Program Model*, 12 CARDOZO L. REV. 1297, 1314 (1991). Riesel and Zarin note that the policy reasons courts have enumerated for application of a self-evaluative privilege are present in the context of environmental audits:

(1) a corporation is likely to desire that such material be kept confidential, and is likely to do all that is possible to ensure such confidentiality; (2) corporate assessment of compliance with environmental laws and regulations and actions to ensure compliance are in the public interest; and (3) the candor and cooperation that confidentiality facilitates is necessary to make such self-critical evaluations efficient and useful.

Id. at 1314 n.51 (citing *Bredice v. Doctors Hosp.*, 50 F.R.D. 249, 250-51 (D.D.C. 1970), *aff'd without op.*, 479 F.2d 920 (D.C. Cir. 1973)).

encourage corporate compliance with environmental laws,¹⁰ and opponents of privilege expansion, such as environmental groups, who argue that privilege laws jeopardize the important public interest of ensuring citizens' right to know the identities of community polluters.¹¹ In light of this tension, the ideal state of uniformity in environmental audit privilege laws remains a distant hope. As long as the privilege remains limited to certain states and scattered federal courts, the potential for privilege protection to establish its purported goal of encouraging voluntary audits will remain thwarted because of companies' concerns that their audit materials may be introduced by an adversarial party in a forum where audit protection does not exist.

I. GROWTH OF ENVIRONMENTAL AUDIT PRIVILEGE LAW THROUGH STATUTORY PROTECTION IN THE STATES

A. *Development of State Environmental Audit Privilege Statutes*

The number of states enacting environmental audit privilege statutes has increased substantially since Oregon enacted the first environmental audit privilege statute in 1993.¹² As of the writing of this article, fifteen states now have environmental audit privilege statutes:¹³ Arkansas,¹⁴ Colorado,¹⁵ Idaho,¹⁶ Illinois,¹⁷ Indiana,¹⁸ Kansas,¹⁹ Kentucky,²⁰ Michi-

10. Indeed, it has been argued that internal auditing is essential to enable a company to manage pollution control rather than simply react to crises, and accordingly can be the best insurance against environmental liabilities. See Murray, *supra* note 1, at 170-71.

11. See Brian Broderick, *State Lawmakers Ask Congress for Relief from EPA Audit Scrutiny*, 19 Chem. Reg. Rep. (BNA) No. 30, at 810 (Oct. 27, 1995).

12. See OR. REV. STAT. § 468.963 (1995); see also *infra* notes 14-28 and accompanying text (enumerating the fifteen states that now have environmental audit privilege statutes). In addition to the legislative activity, several states have addressed environmental audit issues with administrative policies. For example, California's EPA recently adopted a policy that mirrors the federal EPA policy. See *State Lawmakers Weigh Merits of Environmental Audit Bills*, *supra* note 5.

13. Additionally, several states have enacted penalty reduction or immunity provisions for violations discovered through an environmental audit but have not provided a privilege for audit materials. See *infra* notes 84-85 and accompanying text.

14. ARK. CODE ANN. §§ 8-1-301 to -312 (Michie Supp. 1995).

15. COLO. REV. STAT. §§ 13-25-126.5, 13-90-107 (1987 & Supp. 1996). Section 13-25-126.5 provides the circumstances under which a company may invoke the privilege. See *id.* § 13-25-126.5. This section operates in conjunction with section 13-90-107(1)(j), added in 1994, which expressly extended a self-evaluative privilege, previously applicable in the medical context, to include environmental audit reports. See *id.* § 13-90-107(1)(i).

16. IDAHO CODE §§ 9-801 to -811, 9-340(45) (Supp. 1996).

17. 415 ILL. COMP. STAT. ANN. 5/52.2 (West Supp. 1996).

18. IND. CODE ANN. §§ 13-28-4-1 to -28-4-10 (Michie 1996) (replacing §§ 13-10-1-1 to -10-4-3).

19. KAN. STAT. ANN. §§ 60-3332 to -3339 (Supp. 1995).

20. KY. REV. STAT. ANN. § 224.01-040 (Michie 1995).

gan,²¹ Mississippi,²² New Hampshire,²³ Oregon,²⁴ Texas,²⁵ Utah,²⁶ Virginia,²⁷ and Wyoming.²⁸ Explicitly designed to create privilege protection for information unearthed through environmental audits, these statutes, for the most part, do not affect the existing common law privileges that are recognized in state courts.²⁹

The professed goal of these statutes, to further voluntary environmental compliance by encouraging self-evaluation, is set forth expressly in several of the statutes. For example, Arkansas's statute contains a preamble defining the purpose of its environmental audit statute:

The General Assembly hereby finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental laws and that the public will benefit from incentives to identify and remedy environmental compliance issues. It is further declared that limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality and that the voluntary provisions of this subchapter will not inhibit the exercise of the regulatory authority by those entrusted with protecting our environment.³⁰

21. 1996 Mich. Legis. Serv. 290, 290-95 (West) (to be codified at MICH. COMP. LAWS ANN. §§ 324.14801 to 324.14810).

22. MISS. CODE ANN. § 49-2-71 (Supp. 1996).

23. 1996 N.H. Adv. Legis. Serv. 10, 10-16 (Michie) (to be codified at N.H. REV. STAT. ANN. §§ 147-E:1 to -E:9).

24. OR. REV. STAT. § 468.963 (1995).

25. TEX. REV. CIV. STAT. ANN. art. 4447cc (West Supp. 1996).

26. UTAH R. EVID. 508; UTAH CODE ANN. §§ 19-7-101 to -108 (1995).

27. VA. CODE ANN. §§ 10.1-1198 to -1199 (Michie Supp. 1995).

28. WYO. STAT. ANN. § 35-11-1105 (Michie Supp. 1996).

29. See COLO. REV. STAT. § 13-25-126.5(6) (Supp. 1996) ("Nothing in this section limits, waives, or abrogates the scope or nature of any statutory or common-law privilege."); IND. CODE ANN. § 13-28-4-10 (Michie 1996) (replacing § 13-10-3-12) ("This chapter does not limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including the following: (1) The work product doctrine. (2) The attorney client privilege."); see also KAN. STAT. ANN. § 60-3337 (Supp. 1995); 1996 Mich. Legis. Serv. 290, 294 (West) (to be codified at MICH. COMP. LAWS ANN. § 324.14808); 1996 N.H. Adv. Legis. Serv. 10, 14 (Michie) (to be codified at N.H. STAT. ANN. § 147-E:7(II)); Utah R. Evid. 508(g).

30. ARK. CODE ANN. § 8-1-301 (Michie Supp. 1995). Several other statutes contain similar statements of purpose. See COLO. REV. STAT. § 13-25-126.5(1); OR. REV. STAT. § 468.963(1) (1995).

In order to prevent abuse of the privilege, the state statutes generally create exceptions to the privilege.³¹ Thus, the privilege is often referred to as a qualified privilege.³²

B. Typical Structure of State Environmental Audit Privilege Statutes

Both the language and general structure of many of the statutes are drawn from Oregon's 1993 statute.³³ Most of the state statutes that provide for an environmental audit privilege follow a similar structure—a statutory provision creates a privilege and other provisions create certain limitations and exceptions to the privilege.³⁴ The privilege statutes, however, vary in many ways. One of the most significant variations among the statutes is that while some state statutes contain provisions for penalty immunity or reduction if violations are discovered in an audit and voluntarily reported, others are limited to an evidentiary privilege.³⁵

Another variation among statutes that provide an environmental audit privilege is inclusion or exclusion of the privilege in the state's rules of evidence. Of the states with an environmental audit privilege law, only Utah includes the privilege as part of its rules of evidence.³⁶ Utah combines its rule of evidence with statutory sections that extend the privilege to administrative proceedings and testimony by individuals who participated in preparation of the environmental audit.³⁷

In contrast with Utah's rule of evidence, Idaho's statute stands out as one of the most unique in that it does not expressly establish an evidentiary privilege precluding the admission of an environmental audit into evidence or allowing knowledgeable persons to refuse to testify about the content of an environmental audit.³⁸ Instead, section 9-804 of the Idaho

31. See, e.g., ARK. CODE ANN §§ 8-1-307 to -308; IND. CODE ANN. §§ 13-28-4-2 to -28-4-3; KY. REV. STAT. ANN. § 224.01-040(4)(c), (d) (Michie 1995); OR. REV. STAT. § 468.963(3)(b), (c).

32. See O'Reilly, *supra* note 2, at 141.

33. OR. REV. STAT. § 468.963.

34. Compare OR. REV. STAT. § 468.963(3)(b), (c), with KY. REV. STAT. ANN. §§ 224.01-404(4)(c), (d).

35. See *infra* notes 84-111 and accompanying text. Additionally, a few states have enacted laws that create penalty immunity for violations voluntarily disclosed after an internal audit, but that do not provide for an evidentiary privilege. See *infra* note 89.

36. See UTAH R. EVID. 508.

37. Section 19-7-105 of the Utah Code extends the privilege for environmental audit reports to administrative proceedings, and section 19-7-107 extends the protection in Rule 508 to protect as privileged information held by officers or employees who perform or assist in preparation of an environmental audit report. UTAH CODE ANN. §§ 19-7-105, 19-7-107 (1995). For a discussion of other state statutes protecting the testimony of persons preparing an audit see *infra* notes 57-60 and accompanying text.

38. See IDAHO CODE § 9-804 (Supp. 1996). Section 9-804 provides that "Notwithstanding any other provision of law to the contrary, no state of Idaho public official, em-

Code prohibits state public officials, employees, and environmental agencies from compelling the disclosure of the content of any environmental audit report.³⁹ Because they are public employees, this provision prohibits judges and administrative hearing officers from compelling disclosure.⁴⁰ Despite such variations in the statutes' language and structure, however, many of the state statutes accomplish similar results and have several common elements.

1. *The Meaning of Protected Environmental Audit and Environmental Audit Report*

Generally, to be protected, the audit must be the result of voluntary self-evaluation; therefore, the company must perform the audit in-house or hire a qualified outside auditor or consultant to perform that duty.⁴¹ The statutes usually contain detailed definitions of what constitutes a protected environmental audit and a protected environmental audit report, although they vary somewhat in the scope of privileged materials.⁴²

For example, Utah defines an "environmental audit report" broadly, in both its rule of evidence and its statutory provision, extending the provision to administrative proceedings.⁴³ The report encompasses recorded data in a variety of media, including "any document, information, report, finding, communication, note, drawing, graph, chart, photograph, survey, suggestion, or opinion, whether in preliminary, draft, or final form, pre-

employee or environmental agency shall require to be disclosed an environmental audit report prepared by or on behalf of any person, except from any governmental entity." *Id.*

39. *See id.*

40. *See* Katherine B. Crawford, *Act Provides Limited Immunity for Environmental Law Violations*, *ADVOCATE*, at 23-24 (Oct. 1995).

41. *See, e.g.,* IDAHO CODE § 9-803(3) (" 'Environmental audit' means an internal evaluation done pursuant to plan or protocol that is designed to identify and prevent noncompliance and to improve compliance with statutes, regulations, permits, and orders. An environmental audit may be conducted by an owner or operator or by an independent contractor."); KAN. STAT. ANN. § 60-3332(a) (Supp. 1995) (providing that an "[a]udit" means a voluntary, internal assessment, evaluation or review, not otherwise required by environmental law, that is performed by the owner or operator, the owner's or operator's employees, or a qualified auditor and initiated by the owner or operator"); 1996 N.H. Adv. Legis. Serv. 10, 10-11 (Michie) (defining an auditor as "the person or persons engaged or designated by the regulated entity to conduct an environmental audit and may include officers or employees of the regulated entity or independent contractors") (to be codified at N.H. REV. STAT. ANN. § 147-E:1(I)); *see also infra* note 45 and accompanying text (describing UTAH R. EVID. 508(a)(5)).

42. *Compare* UTAH CODE ANN. § 19-7-103(2) (extending protection to "any document prepared as the result of . . . an environmental self-evaluation"), *with* IND. CODE ANN. § 13-11-2-69 (Michie 1996) (limiting protection to information contained in the document labeled "Environmental Audit Report; Privileged Document").

43. UTAH R. EVID. 508(a)(3); UTAH CODE ANN. § 19-7-103(2).

pared as the result of or in response to an environmental self-evaluation."⁴⁴ Utah defines an "environmental self-evaluation" as "a self-initiated assessment, audit or review not otherwise expressly required by an environmental law, that is performed to determine whether a person is in compliance with environmental laws."⁴⁵ Thus, the statute protects only responsive investigations assessing compliance with existing laws, not prospective collections of information for purposes other than compliance with an existing environmental regulation.

Kentucky's definition of a protected environmental audit sweeps more broadly than Utah's, extending protection to evaluation of management systems and, thus, recognizes a wider definition of an environmental audit as a plan designed to ensure compliance on a continuing basis.⁴⁶ Kentucky's statute defines an environmental audit as:

a voluntary, internal and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this chapter, or federal, regional, or local counterparts or extensions thereof, or management systems related to that facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with statutory or regulatory requirements.⁴⁷

44. UTAH R. EVID. 508(a)(3); UTAH CODE ANN. § 19-7 103(2).

45. UTAH R. EVID. 508(a)(5); UTAH CODE ANN. § 19-7-103(4). The Utah Code defines environmental laws as including the requirements of Title 19 of the Utah Code, rules made under that title, or any rules, orders, permits, licenses, or closure plans issued or approved by the Department of Environmental Quality, or any other provision or ordinance addressing protection of the environment. See UTAH R. EVID. 508(a)(4).

46. See KY. REV. STAT. ANN. § 224.01-040(1)(a) (Michie 1995).

47. *Id.* The Idaho Code's definition of an environmental audit, as an internal evaluation prepared pursuant to a plan or protocol, also reflects the concept of an audit as a plan designed to achieve a goal of compliance. See IDAHO CODE § 9-803(3) (Supp. 1996). Similarly, Indiana's statute defines an environmental audit as "a voluntary, an internal, and a comprehensive evaluation" of regulated facilities, activities at regulated facilities, or management systems associated with regulated facilities or activities "that [are] designed to identify and prevent noncompliance with laws and improve compliance with laws, and that [are] conducted by an owner or operator of a facility or activity by an employee of the owner or operator or by an independent contractor." IND. CODE ANN. § 13-11-2-68 (Michie 1996). An "environmental audit report" in turn is the "set of documents prepared as a result of an environmental audit." *Id.* § 13-11-2-69. Other statutes have similar definitional language. See, e.g., ARK. CODE ANN. § 8-1-302 (Michie Supp. 1995); 1996 Mich. Legis. Serv. 290 (West) (to be codified at MICH. COMP. LAWS ANN. § 324.14801(a)); 1996 N.H. Adv. Legis. Serv. 10, 11 (to be codified at N.H. REV. STAT. ANN. § 147-E:1 (IV)); WYO. STAT. ANN. § 35-11-1105(a) (Michie Supp. 1996).

Defining the documents protected under a statutory environmental audit privilege broadly, the Kentucky statute protects environmental audit reports in a range of forms and media.⁴⁸

Like Kentucky, Colorado extends its protection to assessment of management systems—broadly defining an environmental audit report to include “any document . . . related to and prepared as a result of a voluntary self-evaluation.”⁴⁹ Colorado, however, adds the explicit requirement that the audit be “done in good faith.”⁵⁰ The Colorado statute defines a voluntary self-evaluation as a self-initiated assessment that environmental laws expressly do not already require.⁵¹ Accordingly, documents that a regulatory agency requires the company to furnish under a permit or other environmental law are not privileged.⁵²

Some states also require that protected environmental audit materials meet certain formalistic criteria, such as labeling the audit report as a privileged environmental audit or including an audit implementation plan. For example, Indiana defines the protected environmental audit report as the “set of documents prepared as a result of an environmental audit and labeled ‘Environmental Audit Report; Privileged Document.’”⁵³ Although companies can include items developed in the course of the audit in the report, Indiana’s statute appears to limit protection to the items included in the labeled report.⁵⁴ Providing somewhat broader protection, Texas extends privilege protection beyond the materials labeled “Environmental Audit Report: Privileged Document” to other supporting information collected or developed in connection with the audit,

48. See KY. REV. STAT. ANN. § 224.01-040(1)(b). Specifically, in Kentucky, documents protected may include “field notes and records of observations, findings, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys, provided the supporting information is collected or developed for the primary purpose and in the course of an environmental audit.” *Id.*; see also KAN. STAT. ANN. § 60-3332(b) (Supp. 1995).

49. COLO. REV. STAT. § 13-25-126.5(2)(b) (Supp. 1996)

50. *Id.*

51. See *id.* § 13-25-126.5(2)(e).

52. See *id.* § 13-25-126.5(4); see also 1996 Mich. Legis. Serv. 290, 290-91 (West) (to be codified as MICH. COMP. LAWS ANN. § 324.14802); MISS. CODE ANN. § 49-2-71(2)(a) (Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 4447cc(8) (West Supp. 1996); UTAH R. EVID. 508(a)(5).

53. IND. CODE ANN. § 13-11-2-69 (Michie 1996); see also KAN. STAT. ANN. § 60-3332(b) (requiring the report be labeled “Audit Report: Privileged Document”); KY. REV. STAT. ANN. § 224.01-040(1)(b) (requiring the report to be labeled “environmental audit report: privileged document”); 1996 N.H. Adv. Legis. Serv. 10, 12 (Michie) (to be codified at N.H. REV. STAT. ANN. § 147-E:3); WYO. STAT. ANN. § 35-11-1105(a)(ii) (Michie Supp. 1996) (requiring the report be labeled “Environmental Audit Report: Privileged Document”).

54. See IND. CODE ANN. § 13-11-2-69.

but not necessarily part of the labeled report.⁵⁵ New Hampshire, however, denies protection to documents prepared outside the context of the audit report or in the regular course of business, even if the auditor relied on such documents and included them in the audit report.⁵⁶

Several states also expressly extend protection beyond the audit report itself, protecting as privileged testimony regarding matters in the audit by those persons involved in the audit's preparation.⁵⁷ In other states, such as Oregon, it is less clear whether the privilege extends beyond the text of the audit report itself. In its introductory paragraph, Oregon's statute provides that "an environmental audit privilege is recognized to protect the confidentiality of communications relating to such voluntary internal environmental audits," indicating that the statute protects communications relating to creation of the audit and the testimony of those performing it.⁵⁸ The following paragraphs, however, are limiting in that they provide the "Environmental Audit Report" shall be privileged and not admissible as evidence⁵⁹ and define the Environmental Audit Report as including only the audit report itself, which may include field notes and other records of observations; memoranda and documents analyzing the audit report; and an implementation plan.⁶⁰

2. In Camera Review Procedures and Exceptions to the Privilege

As with the one federal court that has recognized a self-evaluative privilege for self-critical analysis in the environmental context,⁶¹ the state

55. TEX. REV. CIV. STAT. ANN. art. 4447cc(4). Article 4447cc(4) allows inclusion of a wide range of supporting materials within the privileged audit report. *See id.* While requiring labeling of the audit report to "facilitate identification" of privileged materials, the provision expressly provides that failure to label a document does not constitute waiver of the privilege or create a presumption that the privilege does not apply. *Id.*

56. *See* 1996 N.H. Adv. Legis. Serv. at 13, (§ 147-E:5(III)). To prevent companies from circumventing this exception, section 147-E:7(III) provides that the statute does not create a privilege for continuous or uninterrupted environmental audits. *See id.* (§ 147-E:7(III)). Similarly, Wyoming requires that, once initiated, the environmental audit must be completed within 180 days. *See* WYO. STAT. ANN. § 35-11-1105(a).

57. *See, e.g.,* COLO. REV. STAT. § 13-90-107(j)(I)(A) (Supp. 1996); 415 ILL. COMP. STAT. ANN. 5/52.2(c) (West Supp. 1996); KAN. STAT. ANN. § 60-3333(b); 1996 Mich. Legis. Serv. 290-91 (West) (to be codified at MICH. COMP. LAWS § 324.14802(4)); 1996 N.H. Adv. Legis. Serv. at 14 (§ 147-E:8); UTAH CODE ANN. § 19-7-107(1) (1995). Section 4447cc(5)(d) of the Texas statute provides that a person can still be called to testify if he or she "actually observed physical events of violation" apart from the auditing process, even if he or she participated in the audit, but that person cannot be called to testify about the auditing process. TEX. REV. CIV. STAT. ANN. art. 4447cc(5)(d).

58. OR. REV. STAT. § 468.963(1) (1995).

59. *Id.* § 468.963(2)-(4).

60. *Id.* § 468.963(6)(b).

61. *See Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 528 (N.D. Fla. 1994).

statutes generally provide a procedure for *in camera* review of an environmental audit report sought in discovery.⁶² Thus, the court is obligated to perform a confidential review to determine whether the report is one that falls within the bounds of a protected environmental audit report. Perhaps recognizing the process of *in camera* review as part of discovery proceedings, Utah's Rule of Evidence 508(b) explicitly provides that "the existence of an environmental audit report, but not its content, is subject to discovery but is not admissible as evidence in an administrative or judicial proceeding."⁶³

a. Exceptions in the Civil Context

The *in camera* review process operates to minimize the extent the privilege for environmental audits protects bad actors by allowing exceptions to the privilege where the court makes certain findings during its review. Oregon's statute, and several modeled after it, provides that in civil or administrative proceedings the court shall require disclosure of the audit materials if, after *in camera* review, it determines that: the information was not subject to the audit privilege; the privilege was asserted for a fraudulent end; or the material demonstrated evidence of noncompliance with environmental laws and efforts to achieve compliance were not promptly begun and pursued with reasonable diligence.⁶⁴ Arkansas has a similar provision that provides some guidance for companies who seek to avoid the noncompliance exception, specifically providing that, if the noncompliance at issue is failure to obtain a permit, the facility operator's effort to comply will be deemed adequate if the operator filed an application for the appropriate permit within ninety days of discovery of the noncompliance.⁶⁵ Several states have further limited the privilege by in-

62. See, e.g., COLO. REV. STAT. § 13-25-126.5(3)(b); IND. CODE ANN. § 13-28-4-2 (Michie 1996); UTAH CODE ANN. § 19-7-106. Section 4447cc(7)(d) of the Texas statute penalizes persons abusing this process, providing for sanctions to be imposed if the court determines a "person intentionally or knowingly claimed the privilege for unprotected documents." TEX. REV. CIV. STAT. ANN. art. 4447cc(7)(d).

63. UTAH R. EVID. 508(b); see also COLO. REV. STAT. § 13-25-126.5(8) (providing that, save the provisions of the statute creating privilege, "existence of the environmental audit report shall be subject to discovery proceedings"); KAN. STAT. ANN. § 60-3333(a) (Supp. 1995) ("An audit report shall be subject to discovery procedures but shall be privileged and shall not be admissible as evidence in any legal action.").

64. See OR. REV. STAT. § 468.963(3)(b); see also 415 ILL. COMP. ANN. STAT. 5/52.2(d)(2) (West Supp. 1996); IND. CODE ANN. § 13-28-4-2; KY. REV. STAT. ANN. 224.01-040(4)(c) (Michie 1995); WYO. STAT. ANN. § 35-11-1105(c)(ii) (Supp. 1996); cf. KAN. STAT. ANN. § 60-3334(d)(2) (providing that the privilege is inapplicable if the party asserting it has failed to implement a management system to ensure compliance with environmental laws).

65. See ARK. CODE ANN. § 8-1-307(b)(1) (Michie Supp. 1995).

cluding a provision, similar to Colorado's, stating that the privilege is inapplicable if, after *in camera* review, the court or administrative law judge determines that "the information contained in the environmental audit report demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property."⁶⁶ Several states also have included limiting provisions which expressly provide, distinct from the fraudulent purpose exception, that the privilege does not apply if the audit was commenced after notice of an impending government investigation.⁶⁷

b. Exceptions in the Criminal Context

The same exceptions to privilege protection most frequently applicable in the civil context, namely assertion of privilege for a fraudulent purpose or failure to promptly institute efforts to correct noncompliance, apply in the criminal context as well.⁶⁸ Exceptions for audits demonstrating a threat to the public health or the environment and for audits commenced after notice of a government investigation also extend to criminal cases.⁶⁹ Most states, however, provide additional, broader protections against abuse of the environmental audit privilege in the criminal context. For example, Oregon's statute provides that a prosecuting authority who has probable cause to believe there has been a violation of environmental laws (based on a source separate from the environmental audit) can obtain the audit by subpoena or search warrant, and that the court will review it in a private hearing before disclosure.⁷⁰ Similar procedures are available to prosecutors under a number of other statutes.⁷¹ Generally,

66. COLO. REV. STAT. § 13-25-126.5(3)(e). Similarly, New Hampshire provides for an exception to the privilege if the audit report "reveals a threat of imminent or substantial harm to the public health or the environment." 1996 N.H. Adv. Legis. Serv. 10, 12 (to be codified at N.H. REV. STAT. ANN. § 147-E:4(III)). Although the New Hampshire provision does not provide for *in camera* review to determine whether the exception applies, presumably such a procedure would be appropriate. See *id.*; see also MISS. CODE ANN. § 49-2-71(1)(d) (Supp. 1996); WYO. STAT. ANN. § 35-11-1105(c)(ii)(D).

67. See 1996 N.H. Adv. Legis. Serv. 10, 12-13 (Michie) (to be codified at N.H. REV. STAT. ANN. § 147-E:4(IV)(a)(2)); see also COLO. REV. STAT. § 13-25-126.5(3)(d); UTAH R. EVID. 508(d)(3).

68. See, e.g., ARK. CODE ANN. § 8-1-308; ILL. COMP. STAT. ANN. 5/52.2(d)(2); IND. CODE ANN. § 13-28-4-3; KY. REV. STAT. ANN. § 224.01-040(d); OR. REV. STAT. § 468.963(3)(c).

69. See, e.g., COLO. REV. STAT. § 13-25-126.5(3)(d), (e); MISS. CODE ANN. § 49-2-71(1)(c), (d); WYO. STAT. ANN. § 35-11-1105(c)(iii).

70. See OR. REV. STAT. § 468.963(4)(a).

71. See, e.g., ARK. CODE ANN. § 8-1-309; ILL. COMP. STAT. ANN. 5/52.2(e); IND. CODE ANN. § 13-28-4-3; KAN. STAT. ANN. § 60-3335(a) (Supp. 1995); KY. REV. STAT. ANN. § 224.01-040(5)(a); TEX. REV. CIV. STAT. ANN. art. 4447cc(9) (West Supp. 1996) (applying a "reasonable cause" standard); WYO. STAT. ANN. § 35-11-1105(c)(v).

the burden falls upon the creator of the audit to request *in camera* review. Failure to do so within thirty days waives the privilege.⁷²

In criminal cases, several statutes also include a broad exception to the privilege similar to the exception to the work-product doctrine in Federal Rule of Civil Procedure 26(b)(3). These exceptions provide that the privilege will be inapplicable where the prosecutor has a compelling need for the information, the information is not otherwise available, and the prosecutor is unable to obtain the substantial equivalent of the information by other means without unreasonable cost and delay.⁷³ Thus, unlike the civil context where most states do not recognize a "compelling need" exception,⁷⁴ disclosure in the criminal context can be premised on a showing of compelling need—a criteria unrelated to the company's efforts to identify and correct its problems. Accordingly, in the criminal context, the com-

72. See, e.g., KAN. STAT. ANN. § 60-3335(b) (providing that the owner or operator has 30 days after the state acquires the audit to request an *in camera* review). A variation exists in Michigan in that the facility operator must give notice objecting to the disclosure to the appropriate law enforcement authority within 30 days, and the law enforcement authority then petitions the court for *in camera* review. See 1996 Mich. Legis. Serv. 290, 291-92 (to be codified at MICH. COMP. LAWS § 324.14804). Wyoming also varies from the norm in providing that the owner or operator must file a petition for *in camera* review within 20 days or the privilege is waived. See WYO. STAT. ANN. § 35-11-1105(c)(vi).

73. Compare FED. R. CIV. P. 26(b)(3) (providing that a party may obtain trial preparation materials if he or she has substantial need of them and is unable to obtain the equivalent without substantial hardship), with IND. CODE ANN. § 13-28-4-3(2)(D) (including as an exception material that "the prosecuting attorney has a compelling need for . . . is not otherwise available; and . . . the prosecuting attorney is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay"), 1996 N.H. Adv. Legis. Serv. 10, 12-13 (to be codified at N.H. STAT. ANN. § 147-E:4(IV)(b)) (providing for an exception to the privilege in criminal proceedings only, if following an *in camera* review, "the material shows evidence of the commission of a criminal offense under an environmental law and the state demonstrates that it has a compelling need for the information and the information is not otherwise available"), OR. REV. STAT. § 468.963(3)(c)(D) (providing an exception for materials relevant to the commission of an offense, in which the "district attorney or Attorney General has a compelling need for the information, the information is not otherwise available and the district attorney or Attorney General is unable to obtain the substantial equivalent of the information by means without incurring unreasonable cost and delay"), WYO. STAT. ANN. § 35-11-1105(c)(iii) (including as an exception to the privilege all or part of a report if the court, in a criminal proceeding, determines that the information is relevant to the commission of an offense under state or federal environmental laws, "the district attorney or attorney general has a need for the information, the information is not otherwise available and the district attorney or attorney general is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay"), and KY. REV. STAT. ANN. § 224.01-040(4)(d)(4) (allowing the prosecution to obtain material relevant to the commission of an offense simply if the prosecutor has a "need for the information," without further qualification).

74. Provisions that permit an exception to the privilege upon a showing of compelling circumstances are the exception to the rule in the civil context. See COLO. REV. STAT. § 13-25-126.5(3)(c).

pany cannot be guaranteed that its efforts to protect against disclosure, through diligently avoiding fraudulent conduct and assuring prompt compliance with any violations discovered, always will preclude discovery of its audit materials. Rather, a loophole exists that may lead to disclosure of audit materials despite all efforts to follow the letter of the rules to maintain confidentiality. This loophole has the potential to play a substantial role in furthering environmental enforcement in states with audit protection laws because it gives the prosecutor a means of obtaining evidence necessary to prosecute environmental infractions by arguing compelling need when the evidence is otherwise lacking.

3. *Burden of Proof*

The state statutes vary somewhat with regard to who has the burden of proving whether a privilege should apply. In Colorado, Michigan, Mississippi, and Utah, a person asserting the environmental audit privilege bears the burden of establishing a *prima facie* case of privilege; the burden then shifts to the person seeking disclosure, who must prove the environmental audit report is not privileged.⁷⁵ Idaho's statute provides that the entire burden of showing that disclosure is appropriate rests on the party seeking disclosure.⁷⁶

In contrast, Texas places the entire burden of establishing the applicability of the privilege on the party asserting the privilege.⁷⁷ Under Oregon's statute, the burden of proving that the privilege applies, as well as the burden of proving that reasonable efforts were taken to correct any noncompliance discovered by the audit, generally falls on the party seeking the privilege's protection.⁷⁸ An exception to the rule in Oregon exists, however, in that the party seeking disclosure has the burden of showing that the privilege was asserted for a fraudulent purpose.⁷⁹ Additionally, in the criminal context, the prosecutor has the burden of proving the conditions for disclosure where the prosecutor seeks disclosure under section 468.963(3)(c)(D), which permits disclosure when the prosecutor has shown both a compelling need and that the substantial equivalent of the information contained in the audit is not available by other means.⁸⁰

75. See COLO. REV. STAT. 13-25-126.5(7); 1996 Mich. Legis. Serv. 290, 293 (West) (to be codified at MICH. COMP. LAWS § 324.14806(1)); MISS. CODE ANN. § 49-2-71(5) (Supp. 1996); UTAH CODE ANN. § 19-7-106(3),(4) (1995); UTAH R. EVID. 508(f).

76. See IDAHO CODE § 9-806(3) (Supp. 1996).

77. See TEX. REV. CIV. STAT. ANN. art. 4447cc(5)(f) (West Supp. 1996).

78. See OR. REV. STAT. § 468.963(3)(d).

79. See *id.*

80. See *id.* § 468.963(3)(c)(D). Other statutes applying the same allocation of burdens include IND. CODE ANN. § 13-28-4-4(d) (Michie 1996); KY. REV. STAT. ANN. § 224.01-040(4)(e) (Michie 1995); WYO. STAT. ANN. § 35-11-1105(c)(iv) (Michie Supp. 1996).

Other states contain modifications of Oregon's rule. For example, Arkansas follows Oregon's approach of generally placing the burden of proving the privilege, including showing appropriate efforts to achieve compliance, on the party seeking protection, but placing the burden of showing that the party seeking protection does so fraudulently, on the party seeking disclosure.⁸¹ In the criminal context, however, Arkansas shifts the burden to the prosecutor to show that the person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance.⁸² Since Arkansas's statute does not have a provision for a prosecutor to obtain audit materials based on compelling need, that circumstance for shifting the burden to the prosecution does not exist in Arkansas.⁸³

4. *Penalty Reduction and Immunity*

Many state statutes limit the protection provided to the simple existence of a privilege without more,⁸⁴ while others provide penalty reduction or immunity for violations discovered in the context of an environmental audit.⁸⁵ Colorado's 1994 statute was the first to provide protection that operates as a "safe harbor" for immunity from penalties as part of its privilege protection.⁸⁶ Industry representatives and government officials in Colorado have characterized this evolution of environmental audit protection statutes as moving beyond merely creating a privilege as intended to address the dilemma companies face in choosing between disclosing the audit, and possibly subjecting themselves to sanctions, or attempting to solve the environmental problem on their own.⁸⁷ Where the statute provides certainty about penalty reduction and immunity, companies can avoid this conundrum. Environmental groups have

81. See ARK. CODE ANN. § 8-1-310 (Michie Supp. 1995).

82. See *id.* § 8-1-310(c).

83. See *id.* § 8-1-310; see also 415 ILL. COMP. STAT. ANN. 5/52.2(e)(5) (West Supp. 1996) (providing that the party asserting the privilege "has the burden of demonstrating the applicability of the privilege," but that the burden shifts to the State's Attorney or Attorney General when the State's Attorney or Attorney General seeks disclosure under certain exceptions).

84. Arkansas, Illinois, Indiana, Kentucky, Oregon, and Utah are among the states that simply provide the privilege, without enhancing the incentives to perform audits by providing immunity from or mitigation of penalties for violations discovered through environmental audits. See *supra* notes 14, 17-18, 20, 24, 26.

85. See *infra* note 89 and accompanying text.

86. See COLO. REV. STAT. § 25-1-114.5 (Supp. 1996); see also O'Reilly, *supra* note 2, at 154-55.

87. See O'Reilly, *supra* note 2, at 154 & n. 180 (citing *Environmental Protection Agency, Auditing Public Meetings*, July 27, 1994 afternoon session, at 20 (statement of Cynthia Goldman for the Colorado Association of Commerce and Industry)).

criticized sharply such provisions for immunity and penalty reductions because they create an avenue for companies to avoid criminal violations under the shield of an audit.⁸⁸ Nevertheless, the number of states providing such immunity provisions, along with their privilege statutes, has grown to include Colorado, Idaho, Kansas, Michigan, Mississippi, Minnesota, New Hampshire, and Texas.⁸⁹

Under the first of these penalty immunity and reduction statutes, the Colorado statute, the company may avail itself of a rebuttable presumption of immunity from penalty if it meets the statutory criteria for a "voluntary disclosure."⁹⁰ Those criteria include requirements that the company disclose environmental problems promptly, that the disclosures are the result of voluntary self-evaluation, that the company respond with adequate efforts to achieve compliance, and that the company cooperate with the appropriate agency or division.⁹¹ The rebuttable presumption of voluntary disclosure, and therefore of immunity, extends to "any administrative and civil penalties associated with the issues disclosed" and to "any criminal penalties for negligent acts associated with the issues dis-

88. See EPA, *Threatened with 'E' Group Suits, Adopts Get-Tough Audit-Law Stance*, 34 Air/Water Pollution Rep.'s Env't Wk. (Bus. Publishers, Inc.), No. 18, at 270-71 (Apr. 29, 1996) (citing the comments of Sierra Club attorney Ross Vincent).

89. See COLO. REV. STAT. § 25-1-114.5; IDAHO CODE § 9-809 (Supp. 1996); KAN. STAT. ANN. § 60-3338 (Supp. 1995); 1996 Mich. Legis. Serv. 290, 294 (West) (to be codified at MICH. COMP. LAWS ANN. § 324.14809); 1996 Minn. Sess. Law Serv. 238, 238-239 (West) (to be codified at MINN. STAT. ANN. § 325E); MISS. CODE ANN. § 49-2-71 (Supp. 1996); 1996 N.H. Adv. Legis. Serv. 10, 14-16 (Michie) (to be codified as N.H. REV. STAT. ANN. § 147-E:9); TEX. REV. CIV. STAT. ANN. art. 4447cc(10) (West Supp. 1996). Notably, while most of the penalty immunity provisions were enacted as part of the same legislation as the state's environmental audit privilege law, in other states the two pieces of legislation were enacted separately. Minnesota recently enacted its penalty immunity provision, but it has a separate bill for an audit privilege in committee. See S.F. No. 1759 (Minn. 1995), *available in* Westlaw, MN-Bills Database. Similarly, South Dakota has enacted a statute protecting a company from penalties if it voluntarily discloses information discovered through an environmental audit. See S.D. CODIFIED LAWS § 1-40-33 (Michie Supp. 1996). However, although South Dakota's statute provides that the state's department of environmental protection cannot request the results of an audit, the environmental audit is subject to discovery according to the rules of civil and criminal procedure. See *id.* § 1-40-35. Along the same lines, New Jersey has enacted legislation that provides limited immunity, but no privilege protection, for certain voluntary disclosures. See N.J. STAT. ANN. § 13:1D-130 (West Supp. 1996). The State of Washington also has a policy to grant immunity for violations discovered through audits. See *State Lawmakers Weigh Merits of Environmental Audit Bills*, State Env't Daily (BNA) (Apr. 19, 1996), *available in* Westlaw, BNA-SED Database or LEXIS, BNA Library, BNASED File.

90. COL. REV. STAT. § 25-1-114.5. In contrast, Texas places the burden on the party claiming immunity first to establish a prima facie case that the disclosure was voluntary. See TEX. REV. CIV. STAT. ANN. art. 4447cc(10)(f). The burden then shifts to the enforcement authority to rebut the presumption. See *id.*

91. See COLO. REV. STAT. § 25-1-114.5(1)(a)-(d).

closed.”⁹² The prosecutor can rebut the presumption only by a showing that the disclosure was not “voluntary” within the meaning of the statute. Additionally, an exception exists to the rebuttable presumption when a person or entity is found to have “committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws.”⁹³

Michigan’s statute has a similar structure, but expressly limits immunity in that it does not extend immunity to criminal penalties or fines for gross negligence.⁹⁴ Michigan’s statute also differs in that it expressly provides that an audit is not voluntary unless it occurs *before* the entity is made aware that it is under investigation for potential violations of law.⁹⁵ However, Michigan does provide a middle ground where, if the company does not meet the requirements for voluntary disclosure, but shows a good faith effort was pursued to voluntarily disclose, the nature and extent of the good faith effort will be considered in mitigation of penalties.⁹⁶

Similarly, Kansas’s statute also provides for a rebuttable presumption of immunity when a person promptly makes a voluntary disclosure of a violation discovered in an audit to the appropriate regulatory agency.⁹⁷ The statute conditions immunity on the company’s diligent initiation of efforts to correct the violation and to cooperate with the appropriate agency.⁹⁸ A disclosure is not voluntary if state law requires the disclosure to be reported,⁹⁹ and a lack of voluntariness is one of several bases for rebutting a presumption of immunity.¹⁰⁰ Other bases for rebutting the presumption include an intentional or willful violation of the law, a failure to correct a violation in a diligent manner, and a showing that “significant environmental harm or a public health threat was caused by the violation.”¹⁰¹ This last basis creates a significant exception allowing pros-

92. *Id.* § 25-1-114.5(4).

93. *Id.* § 25-1-114.5(6).

94. See 1996 Mich. Legis. Serv. 290, 294 (West) (to be codified at MICH. COMP. LAWS § 324.14809(1)).

95. See *id.* (§ 324.14809(1)(d)).

96. See *id.* at 295 (§ 324.14809(5)); see also TEX. REV. CIV. STAT. ANN. art. 4447cc(10)(e) (West Supp. 1996) (providing for several mitigation factors including “(1) the voluntariness of the disclosure; (2) efforts by the disclosing party to conduct environmental or health and safety audits; (3) remediation; (4) cooperation with government officials investigating the disclosed violation; (5) or other relevant considerations”).

97. See KAN. STAT. ANN. § 60-3338 (Supp. 1995). The entity making the assertion of voluntary disclosure must make a *prima facie* showing of voluntariness, and then the opposing entity has the burden of rebutting the presumption. *Id.* § 60-3338(d).

98. See *id.* § 60-3338(a).

99. See *id.* § 60-3338(b).

100. See *id.* § 60-3338(c)(1).

101. *Id.* § 60-3338(c)(2)-(4).

ecutors to rebut the presumption of penalty immunity despite a company's diligent efforts to correct the problem and to cooperate with the regulatory agency.

New Hampshire's statute places strict time limits on disclosure, waiving penalties only if the company discloses the violations discovered in the audits within thirty days, commits to perform remediation within ninety days, or, if infeasible, within a period approved by the state agency, and reports to the agency within ten days of completion of the remedial action.¹⁰² Exceptions to immunity exist if a criminal act was committed knowingly, purposefully, or recklessly; if the company has been the subject of certain past compliance actions; and if the state discovered the violation prior to an investigation or disclosure by the company.¹⁰³

Idaho's statute contains broad language granting penalty protection for voluntary disclosures.¹⁰⁴ It provides that if a party voluntarily discloses an environmental audit report, in whole or in part, to the appropriate state agency, the person making the disclosure will not be subject to penalties or incarceration for acts associated with violations revealed by the audit materials.¹⁰⁵ Like many other state statutes, Idaho's statute creates a rebuttable presumption of voluntary disclosure, provided that the disclosure was made in a timely manner, is a result of the environmental audit, and appropriate efforts were made promptly to achieve compliance.¹⁰⁶ Idaho's statute aims to curtail bad actors in two ways: the immunity does not extend to entities with repeated serious violations of environmental laws, nor is immunity extended in cases of serious violations that have been the subject of multiple settlement agreements within the three years prior to the audit.¹⁰⁷ Under Idaho's statute, however, immunity presumably would not apply if the regulated party does not meet the statutory requirement of disclosing to the "appropriate" state

102. See 1996 N.H. Adv. Legis. Serv. 10, 14-15 (Michie) (to be codified at N.H. REV. STAT. ANN. § 147-E:9(I)). Texas provides an alternative means to ensure timely reporting, requiring that in order to receive immunity, a facility conducting an environmental audit must give notice of the plan to commence the audit, the anticipated time it will begin, and the planned scope of the audit. See TEX. REV. CIV. STAT. ANN. art. 4447cc(10)(g) (West Supp. 1996).

103. See 1996 N.H. Adv. Legis. Serv. at 15-16 (§ 147-E:9(II)).

104. See IDAHO CODE § 9-809 (Supp. 1996). Texas's statute is also notably broad in that it applies not only to voluntary environmental audits, but also to health and safety audits. See TEX. REV. CIV. STAT. ANN. art. 4447cc(10)(b)(4).

105. See IDAHO CODE § 9-809(1). The provision provides that "[a]ny person that makes a voluntary disclosure" will be "immune from state prosecution, suit or administrative action for any civil or criminal penalties or incarceration for acts associated with the issues disclosed." *Id.*

106. See *id.* § 9-809(2)(a)-(c).

107. See *id.* § 9-809(6).

agency.¹⁰⁸ In addition, Idaho's statute does not affect a company's ability to avoid environmental liability required by a consent order or other remedial action concerning an "imminent hazard" associated with the disclosure.¹⁰⁹ Thus, the protection from civil or criminal penalties and criminal prosecution has been interpreted as extending only to the imposition of fines or punishment, and not to orders for remedial action.¹¹⁰

It must be noted that these penalty immunity statutes create immunity solely for violations of state environmental law. Accordingly, state environmental audit statutes have no bearing on actions by federal agencies enforcing federal laws. Nevertheless, the EPA has expressed concern that the breadth of immunity provided by statutes such as Idaho's will create an impediment to successful federal regulation of the environment, particularly in those areas where state and federal regulations cross paths such as where EPA has delegated an area of regulation to the state.¹¹¹

5. *Time Limits on Statutes' Effectiveness*

Finally, reflecting the cutting-edge, experimental nature of environmental audit protection statutes, several states have imposed temporal limits on their environmental audit privilege statutes. For example, New Hampshire's statute expressly states that the law is to be repealed in 2002 "unless it can be demonstrated to be effective in encouraging enhanced voluntary compliance with environmental laws, and not in providing opportunities for avoidance of such compliance."¹¹² New Hampshire's legislature calls for its Department of Environmental Services, in consultation with other environmental interests to report to the court in 2001.¹¹³

108. See *id.*; see also Crawford, *supra* note 40, at 23. Ms. Crawford is an Idaho Deputy Attorney General. See *id.* at 25.

109. IDAHO CODE § 9-809(7).

110. See Crawford, *supra* note 40, at 23 (citing IDAHO CODE §§ 9-809(6)-(7)).

111. See *infra* notes 244-66, and accompanying text (discussing the effect of EPA's Final Policy on state audit privilege laws, actions taken by the EPA in regions with state privilege laws, and efforts by the EPA to discourage additional state legislation). The circumstance where EPA has delegated regulatory authority to a state raises an interesting question of whether state-law penalty immunity applies when the federal government then steps back in to bring an enforcement action.

112. 1996 N.H. Adv. Legis. Serv. 10, 16 (Michie) (to be codified at N.H. REV. STAT. ANN. § 4:3). Similarly, Colorado's statute "applies only to all voluntary self-evaluations that are performed during the period beginning June 1, 1994 and ending June 30, 1999." COLO. REV. STAT. § 13-25-126.5(9) (Supp. 1996).

113. See N.H. Adv. Legis. Serv. at 16 (§ 4:3).

C. *Impact of the State Privilege Statutes*

Comments are mixed regarding the effectiveness of these state environmental audit privilege laws in accomplishing their expressed goal of furthering voluntary compliance. In Colorado, reports have shown that more audits have been conducted.¹¹⁴ Similarly, reports on Texas's statute indicate an increase in the number of companies conducting audits.¹¹⁵

In contrast, reports at a seminar on Oregon's statute have demonstrated that Oregon's statute did not appear to have increased the number of companies performing audits.¹¹⁶ These distinctions may indicate that the penalty immunity laws are more effective than the simple privilege protection laws. The lack of uniformity due to the absence of any statutory federal privilege, however, leaves it unclear whether Oregon's law would be more effective if the privilege extended to every forum. The lack of federal privilege protection gives companies good reason not to attempt new audit efforts simply because states have created some local protection. Nonetheless, it seems likely that the privilege laws, even without penalty immunity, further at least some increase in voluntary audits. Because of the local nature of the state legislative privilege initiatives, locally-based, small and medium sized companies are most likely to be encouraged by the state privilege statutes to perform audits, and at least one commentator has observed that those are precisely the entities most likely not to be conducting audits in the absence of a privilege out "of fear [that] what they find may be used against them."¹¹⁷

114. See Susan Bruninga, *Benefit of More Audits Would Offset Intentional Violations*, *Bill Supporters Say*, 19 Chem. Reg. Rep. (BNA) No. 14, at 374 (July 7, 1995). Testifying before Congress on a proposed parallel federal law, Cynthia Leap Goldman of the Colorado Association of Commerce and Industry reported that "'Colorado companies are conducting more audits and are more thorough.'" *Id.*

115. See *Immunity, Privilege Law Reveals Violations That State Would Not Detect*, *Officials Say*, 26 Env't Rep. (BNA) No. 50, at 2436 (Apr. 26, 1996) (noting that approximately 165 firms notified the Texas Natural Resource Conservation Commission of their plans to perform environmental audits and that 20 provided the Commission with their results).

116. See *Effects of State's Audit Privilege Law Still Unclear After First Year*, *Lawyers Say*, 25 Env't Rep. (BNA) No. 33, at 1621 (Dec. 16, 1994) (reporting on the comments of Portland, Oregon attorney Lynne Perry at the annual Hazardous Waste Law and Management Conference, co-sponsored by the Northwestern School of Law at Lewis & Clark College and Region X of the Environmental Protection Agency on December 8 and 9, 1994). The report indicated, however, that Oregon's audit privilege law had influenced how companies organized their audits and raised awareness of audit programs generally. See *id.*

117. Murray, *supra* note 1, at 173.

II. CONSIDERATION OF A FEDERAL ENVIRONMENTAL AUDIT PRIVILEGE

In light of both the growth of an environmental audit privilege in the states, and the continuing disapproval of such developments from the EPA, both industry and state lawmakers have urged Congress to enact a federal statute to protect environmental audit materials. Among the bills under consideration in Congress is one proposed in February 1995 by Representative Joel Hefley, a Republican from Colorado, entitled the Voluntary Environmental Self-Evaluation Act.¹¹⁸ The bill, H.R. 1047, would create a privilege to shield corporate audits from disclosure in both judicial and administrative proceedings.¹¹⁹ More specifically, the proposed legislation states that an environmental audit that is voluntary and made in good faith will be inadmissible evidence in a legal action or administrative procedure pursued under federal environmental law.¹²⁰ Privilege protection under H.R. 1047 also would extend to the testimony of persons who conducted the environmental audit.¹²¹ Like the state statutes, the bill creates exceptions to the privilege and calls for an *in camera* review process to evaluate whether an exception applies.¹²² Exceptions include compelling circumstances justifying disclosure, failure to take adequate steps toward compliance, fraudulent use of the privilege, or preparation of the audit report for the purpose of avoiding disclosures in a government investigation.¹²³ Additionally, H.R. 1047 creates a rebuttable presumption of voluntary disclosure that immunizes the company from all administrative, civil, or criminal penalties for violations voluntarily disclosed as a result of an audit.¹²⁴

Senator Mark Hatfield of Oregon also has introduced two Senate bills providing for an environmental audit privilege. In 1994, Senator Hatfield introduced S. 2371 providing for a federal environmental audit privilege

118. H.R. 1047, 104th Cong. (1995). Alternately, supporters of state audit privilege laws have sought relief by seeking a rider on the EPA fiscal 1996 appropriations bill, H.R. 2099. See Broderick, *supra* note 11, at 811. Such a rider would prevent the EPA from an action against a facility found in a state with an audit privilege statute where the violations were appropriately reported as a result of an environmental audit. See *id.*

119. Voluntary Environmental Self-Evaluation Act, H.R. 1047, 104th Cong. § 4(a) (1995).

120. *Id.* The term "Federal environmental law" is defined in section 3 of the bill which includes several federal statutory programs such as the Federal Insecticide, Fungicide, and Rodenticide Act and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See *id.* § 3(4).

121. *Id.* § 5.

122. *Id.* § 4(a)(2).

123. *Id.*

124. *Id.* § 6(c).

loosely modeled on Oregon's statute.¹²⁵ Although similar to the House bill in that it provided privilege protection, S. 2371 did not extend to penalty immunity provisions. Nearly a year later, however, Senator Hatfield introduced a second bill, S. 582, that more closely models the structure of H.R. 1047 in providing protection for voluntarily prepared environmental audit reports and testimony of the persons preparing the audit, as well as penalty immunity for voluntary disclosures and a rebuttable presumption of voluntariness.¹²⁶ Both H.R. 1047 and S. 582 were in committee as of the time of this writing.

Proponents of a federal environmental audit privilege law argue, as have proponents of such bills in the states, that existence of such a privilege and penalty immunity for voluntary disclosure will encourage voluntary environmental law compliance by encouraging voluntary auditing. In the federal arena, these proponents have pointed to statistics in the states as proof of the success of such statutes. For example, a Texas lawmaker reported that since enactment of Texas's audit privilege statute, more than a hundred companies have volunteered to conduct audits and that, due to the complexity of environmental laws, "companies 'typically' are out of compliance without knowing it."¹²⁷ Similarly, a Mississippi representative reported that the state's privilege law caused a large number of companies to come forward with audit results, therefore, promoting a cleaner environment.¹²⁸

In contrast, critics of the proposed federal legislation, who include environmentalists, proponents of consumer rights, and officials at the EPA and the Department of Justice, have argued that the privilege and penalty immunity provisions proposed in H.R. 1047 would make enforcement by regulatory agencies and civil action by citizens' groups too difficult.¹²⁹ As the Environmental Defense Fund stated in a press release, environmentalists remain concerned that the privilege provisions "'would allow companies to cloak in secrecy many of their routine environmental audits and thus preclude government and public access to the information.'"¹³⁰ Moreover, EPA expressed concern that the bill would allow gross negli-

125. S. 2371, 103d Cong. (1994); 140 CONG. REC. S10,942-44 (daily ed. Aug. 8, 1994) (text of S. 2371 and remarks of Senator Hatfield on the bill).

126. S. 582, 104th Cong. (1994); 141 CONG. REC. S4262 (daily ed. Mar. 21, 1995) (statement of Senator Hatfield introducing S. 582).

127. Broderick, *supra* note 11, at 810 (reporting remarks of Republican Texas State Representative Warren Chisum).

128. *See id.* (quoting remarks of Republican Mississippi State Senator Mike Gunn).

129. *See* Bruninga, *supra* note 114, at 374.

130. *Id.* (quoting an Environmental Defense Fund press release).

gence to go unpunished as long as the company disclosed its violations "voluntarily."¹³¹

Critics have also complained that the bill does nothing to prevent abuse of the law for short term profit, noting that some companies will recognize that they can profit significantly from even a limited time of operations that are not in compliance with environmental regulations. Representative Jack Reed, a Democrat from Rhode Island, voiced concern that limits on fines and penalties could allow a company to deliberately engage in short term criminal conduct, undertake an audit to reveal the action, take corrective steps, and thus be immunized.¹³² Similarly, Steven Herman, EPA Assistant Administrator for Enforcement, noted that the bill "'glosses over the significant economic benefit the companies receive while they're not in compliance with the law.'"¹³³

Thus far, no clear solution to concerns about abuse of an environmental audit privilege and penalty immunity law has been reached. Even an industry group, gathered to respond to criticisms of the federal legislation and propose improvements to H.R. 1047, agreed that "bad actors" should not be protected and that companies exhibiting patterns of non-compliance should be excluded from protection.¹³⁴ The group, however, found it difficult to craft a provision that accurately defines such a pattern.¹³⁵ The only solution may be for Congress to follow the pattern of the states and enact short term legislation that can be repealed if companies' behavior proves that abuse of the statute outweighs its benefits.¹³⁶ Current statistics, however, cannot present an accurate picture of how federal audit protection laws would fare because it is not possible to assess accurately how many companies would voluntarily conduct audits until uniformity of law protects those audit results from all enforcement officials, including federal officials. An alternative solution that might minimize abuses would be to limit environmental audit protection to the creation of a privilege without penalty immunity, as did Senator Hatfield's original bill and

131. *More States Adopt Audit Privilege Laws; EPA Calls Federal Legislation Ill-Advised*, 25 Env't. Rep. (BNA) No. 44, at 2186 (Mar. 10, 1995).

132. See Bruninga, *supra* note 114, at 374.

133. *Id.* (quoting statements of Herman at a hearing before House Subcommittee on Commercial and Administrative Law on June 29, 1995).

134. *Industry, Environmentalists Seek Deal on Alternative Compliance Bill*, 16 Inside EPA Wkly. Rep., No. 37, at 11-12 (Sept. 15, 1995).

135. See *id.* at 12 (observing that the group had not yet finalized its recommendations to Congress).

136. See IDAHO CODE § 9-809 (Supp. 1996) (providing that the statute be null and void after December 31, 1997); *supra* notes 112-13 and accompanying text (discussing state statutes that have created time limits on the statute's effectiveness).

several state statutes.¹³⁷ Based on the current trend toward more expansive protection, embodied in Senator Hatfield's second bill, however, such a restriction appears unlikely. Rather, as work is ongoing to make revisions to last year's audit bills, it seems likely that revised bills offering broader protection to industry will emerge from committee.¹³⁸

III. PROTECTION OF ENVIRONMENTAL AUDIT MATERIALS IN THE FEDERAL COURTS AS A MATTER OF JUDICIALLY DEVELOPED PRIVILEGE LAW

In the absence of a federal statute creating an environmental audit privilege, a second avenue for audit protection is developing in the federal courts.¹³⁹ Such protection is not widely recognized by any means, but rather has been utilized successfully in only a few isolated cases. Two theories exist for audit protection: (1) protection under traditional attorney-client privilege and work product theories, and (2) protection under the developing self-evaluative privilege.¹⁴⁰

137. See *supra* notes 125-26 and accompanying text (describing S. 2371 and S. 582).

138. See *House Continues Work on Audit Legislation With Eye Towards 1997*, 17 *Inside EPA Wkly. Rep.*, No. 10, at 15-16 (Mar. 8, 1996) (noting that the revisions are aimed at several issues states and industry sources raised).

139. Although many state legislatures have developed statutory privilege protection for audits, state courts have not followed suit, rejecting the theories for privilege protection for audits that have developed in the federal courts. See, e.g., *Combined Communications Corp. v. Public Serv. Co.*, 865 P.2d 893, 898 (Colo. Ct. App. 1993) (emphasizing the limited scope of the self-critical analysis privilege and observing that the unanimous Supreme Court decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) "dampened" the "impetus toward recognition of any such privilege"); *Artesian Water Co. v. New Castle County*, No. C.A. 5106, 1981 WL 15606, at *3-4 (Del. Ch. Apr. 9, 1981) (finding that Delaware generally has not recognized a self-evaluative privilege, and that, even if it had, the court would not apply such a privilege to documents created by panel of experts that included representatives of several governmental agencies); *Kansas Gas & Elec. v. Eye*, 789 P.2d 1161, 1167 (Kan. 1990) (applying a balancing test to determine whether the privilege applied and concluding that the injury likely to be caused by disclosure was outweighed by the benefits to be gained, including "correct disposal of the litigation"); *CPC Int'l v. Hartford Accident and Indem. Co.*, 620 A.2d 462, 467 (N.J. 1992) (holding that the public need for disclosure of documents regarding environmental pollution outweighed the need for confidentiality, but recognizing that the self-critical analysis privilege may apply in other contexts, as when the public need for confidentiality outweighs the public need for disclosure); *Ohio ex rel. Celebrezze v. CECOS Int'l*, 583 N.E.2d 1118, 1121 (Ohio Ct. App. 1990) (holding that heavy regulation and public scrutiny of the hazardous waste industry created obligations that could not be avoided by invoking the self-evaluative privilege).

140. Where a federal court is not disposed toward finding that a privilege exists under either of these two theories, a party may still be able to seek privilege protection in federal court based on state statutes if a state law claim is involved. A federal court sitting in diversity generally will recognize state-law privilege claims. See *O'Reilly*, *supra* note 2, at 139 (citing *Erie v. Tompkins*, 304 U.S. 64 (1938), for the proposition that a federal judge should recognize a state privilege in cases that arise out of local claims but where federal court status arises out of diversity jurisdiction). In addition, a state privilege would have

A. *Attorney-Client Privilege and the Work-Product Doctrine*

In *Olen Properties Corp. v. Sheldahl, Inc.*,¹⁴¹ a magistrate in the Central District of California ruled that the attorney-client privilege protected environmental audit memoranda prepared by company personnel to assist the company's attorneys in evaluating its compliance with environmental laws and regulations.¹⁴² Denying a motion to compel production of audit documents, the court held that the defendant company communicated confidential information to its attorneys to secure legal advice, and therefore its communications were protected by the attorney-client privilege.¹⁴³ In reaching its conclusion, the court held the defendant had the burden of establishing that the privilege applied.¹⁴⁴ In determining that the privilege did apply, the court cited a declaration from the employee who prepared the audit materials stating that he did so "to assist the attorneys in evaluating compliance with relevant laws and regulations."¹⁴⁵ Evaluating this declaration, the court concluded that "[t]he reports appear to have been prepared for the purpose of securing an opinion of law."¹⁴⁶ Thus, the court concluded that the materials satisfied the requirements of the attorney-client privilege.¹⁴⁷

Similarly, in *Martin v. Bally's Park Place Hotel & Casino*,¹⁴⁸ the Third Circuit upheld a privilege protecting a consultant's report prepared for internal evaluation of the source of an employee's chemical exposure.¹⁴⁹ In opposing the application of privilege, the Secretary of Labor high-

persuasive value in federal question cases, particularly where there are pendent state law claims. *See id.* at 152. *But see infra* notes 183-200 and accompanying text (discussing the exception to the self-evaluative privilege when a government agency seeks documents).

141. 38 Env'tl. Rep. Cas. (BNA) 1887 (C.D. Cal. 1994).

142. *See id.* at 1888.

143. *See id.*

144. *See id.* (citing *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992)).

145. *Id.*

146. *Id.*

147. *See id.* The *Olen* court relied on the requirements for the privilege set out in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). These requirements include:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United Shoe, 89 F. Supp. at 358-59.

148. 983 F.2d 1252 (3d Cir. 1993).

149. *See id.* at 1254.

lighted that the consultant's inquiry occurred prior to commencement of litigation.¹⁵⁰ Nonetheless, the court held that the consultant's report was protected work product based on the fact that the attorney ordering preparation of the report had a "unilateral belief" that litigation would result.¹⁵¹ As grounds for its ruling, however, the Third Circuit clearly stated that it would recognize the privilege only in cases like the one at hand, in which there was a reasonable prospect of litigation.¹⁵² The court further distinguished routine exposure records from the report at issue in this case, where an attorney had commissioned a report when already aware of an employee's complaint to the Occupational Safety and Health Administration (OSHA).¹⁵³

Thus, when environmental audits are prepared in anticipation of litigation or under the direction of a lawyer for the purpose of seeking legal advice, the attorney-client privilege or work-product doctrine may protect the audit materials.¹⁵⁴ In many circumstances, however, as is illustrated by the narrowness of the *Martin* court's holding, it is quite possible that courts will find that the conditions under which the audit was made warrant a finding that the attorney's involvement was for routine business or investigative purposes, rather than in preparation for litigation.¹⁵⁵ Moreover, use of outside law firms to conduct audits in order to obtain privilege protection often results in a much less efficient and effective auditing process.¹⁵⁶ Using an outside law firm not only is expensive,¹⁵⁷ but it also requires relaying the message about environmental problems from the technical consultant through the lawyer to management.¹⁵⁸ The message may be muffled by the layers of translation and arguably may be less effective than if technical staff within the company were making their argument directly to management.¹⁵⁹

150. See *id.* at 1257.

151. *Id.* at 1260.

152. See *id.*

153. *Id.* at 1254, 1261.

154. See *id.* at 1261 (protecting an OSHA report prepared in anticipation of litigation).

155. See *id.* at 1260.

156. See 140 CONG. REC. S10,943 (daily ed. Aug. 8, 1994) (remarks of Senator Hatfield regarding S. 2371, noting that, in Oregon, the environmental audit privilege protection statute has "reduced the cost of auditing and has created a better flow of information with companies").

157. See *id.* By eliminating the need to hire an attorney to seek the privilege, the Oregon statute has provided the additional benefit of cutting lawyers out of the process, therefore, reducing the cost of environmental auditing to companies. See *id.*

158. See O'Reilly, *supra* note 2, at 136.

159. See *id.* at 136-37 (noting that "[r]outine auditing produces the best results," but that the need to hire lawyers to perform even routine audits will discourage routine auditing).

Thus, frequently, an attempt to use the traditional protection of the attorney-client privilege and the work-product doctrine as a shoehorn for the environmental audit privilege is impractical.¹⁶⁰ Under these circumstances, the developing law of self-evaluative privilege may be an alternative for a company conducting routine internal investigations when no pre-existing conflict or request for legal advice stems the investigation.

B. The Self-Evaluative Privilege as Protection for Audit Materials

The second theory for applying the privilege in the context of federal litigation derives from the self-evaluative privilege which, in some cases, has been recognized to protect a company's confidential, self-evaluative investigations in circumstances where doing so would encourage an inquiry that serves the public interest.

1. Background of the Self-Evaluative Privilege

The possibilities for this fledgling privilege stem from the breadth of Federal Rule of Evidence 501,¹⁶¹ which as enacted does not include the several specified categories of privilege that Congress originally contemplated, but rather provides simply that the privileges found in the common law, as interpreted by the courts of the United States, are to govern.¹⁶² The congressional judgment not to explicitly incorporate the nine common-law privileges recommended by the Advisory Committee and the United States Supreme Court suggests that Congress intended the privilege doctrine to be "fluid rather than static and that courts not

160. See *Binks Mfg. Co. v. Nat'l Presto Indus.*, 709 F.2d 1109, 1120 (7th Cir. 1983) (holding that despite the "remote prospect of future litigation," the defendant nonetheless must bear the burden of proving that the materials were prepared in anticipation of litigation); *United States v. Chevron U.S.A. Inc.*, Civ. A. No. 88-6681, 1989 WL 121616, at *5-6 (E.D. Pa. Oct. 16, 1989) (holding that the attorney-client privilege was inapplicable to audit reports because, although counsel was involved in the audit process, the communications sought to be protected were made for business, not legal, purposes); see also James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 567 (1983) (noting that protection under traditional doctrines of work-product and attorney-client privilege may fail "if counsel has been retained for his investigative skill rather than his legal acumen"); Richard S. Pabst, *The Corporate Dilemma: Is it Possible to Preserve a Privilege for Environmental Audits?*, 41 LA. B.J. 110, 111-12 (1993) (describing the difficulty of fitting an environmental audit within the attorney-client privilege or the work-product doctrine).

161. FED. R. EVID. 501.

162. See Carol Ann Humiston, *Paved with Good Intentions: The Use of Internal Evaluations of Law Enforcement Agencies in Civil Lawsuits*, 41 FED. B. NEWS & J. 364, 367 (1994) (quoting Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1084-85 (1983)).

feel unduly constrained in developing previously unrecognized privileges."¹⁶³

a. The Self-Evaluative Privilege Began in the Medical Malpractice Context

The courts' recognition of a self-evaluative privilege, also known as the self-critical analysis privilege, finds its roots in the context of medical malpractice in *Bredice v. Doctor's Hospital, Inc.*¹⁶⁴ In *Bredice*, the court held that a hospital's "peer review" committee reports were not discoverable in a medical malpractice suit because of the strong public interest in hospitals being able to engage in ongoing, confidential self-analysis to improve the care offered to patients.¹⁶⁵ The court observed that the effective functioning of these committees required confidentiality.¹⁶⁶ Hospital staff members could not make candid constructive criticisms if those criticisms would be made available in discovery and later twisted by the opposing party into denunciation of a doctor's methods in a malpractice suit.¹⁶⁷ Accordingly, the court concluded that the public interest in furthering improved hospital care by confidential self-analysis outweighed the need for disclosure of such information absent extraordinary circumstances.¹⁶⁸ The *Bredice* court relied on three criteria in reasoning that the privilege should apply: the materials were (1) kept confidential; (2) evaluative; and (3) germane to an inquiry that was in the public's interest.¹⁶⁹ These elements subsequently have become the guidepost for application of the privilege in other areas.¹⁷⁰

163. *Id.* at 367. *But see* *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (holding that the federal courts' authority under Federal Rule of Evidence 501 to recognize privileges not generally recognized by the common law or created by statute should not be exercised "expansively").

164. 50 F.R.D. 249, 250-51 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

165. *See id.* at 250.

166. *See id.*

167. *See id.*

168. *See id.* at 251.

169. *See id.* at 250-51.

170. *See* Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 359-60 (1987).

In one of the first cases to expand the privilege beyond the medical peer review field, the United States District Court for the Northern District of Georgia refused to allow plaintiffs to review reports the defendant's research team prepared because the reports included candid self-analysis and evaluation of the employer's actions. *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 284-85 (N.D. Ga. 1971). The court concluded that disclosure of such confidential reports would discourage candid self-criticism and evaluation in affirmative action plans, and thus would be contrary to public policy. *See id.* at 285. More recently, in *Flynn v. Goldman, Sachs & Co.*, No. 91 Civ. 0035, 1993 WL 362380 (S.D.N.Y. Sept. 16, 1993), the court recognized a common-law privilege for self-critical analysis where "an

b. *The Self-Evaluative Privilege Has Remained Ill-Defined in the Federal Courts with Courts Advocating Case-by-Case Determination*

Since *Bredice*, the self-evaluative privilege has gained acceptance in the medical malpractice context.¹⁷¹ In some other contexts, courts have recognized that a qualified privilege exists for various kinds of confidential self-evaluation by institutions performing functions essential to the public health or safety.¹⁷² The policy underlying the self-evaluative privilege in both medical and non-medical contexts is to serve the public interest by preventing a “‘chilling’ effect on self-analysis” and by promoting “candid and frank self-evaluation.”¹⁷³ The courts have applied the privilege on a case-by-case basis, pursuant to which self-evaluative summaries generally are not discoverable unless “exceptional circumstances” warrant discovery.¹⁷⁴

intrusion into the self-evaluative analyses of an institution would have an adverse effect on the [evaluative] process, with a net detriment to a cognizable public interest.’ ” *Id.* at *1 (quoting *Cobb v. Rockefeller Univ.*, No. 90 CIV. 6516, 1991 WL 222125, at *1 (S.D.N.Y. Oct. 24, 1991)). The court protected a consulting firm’s reports prepared to investigate the equal employment of women. *See id.* at *1; *see also* *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 508-510 (E.D. Pa. 1987) (applying the self-critical analysis privilege to evaluative portions of a railroad accident investigative report); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 621-22 (N.D. Tex. 1981) (protecting as privileged the internal investigations of a special officer appointed by a company to implement a consent decree with the Securities Exchange Commission); *Rosario v. New York Times Co.*, 84 F.R.D. 626, 631 (S.D.N.Y. 1979) (holding that the self-evaluative privilege protects an employer’s self-evaluative materials regarding affirmative action).

171. In addition, most of the states have statutorily protected medical peer reviews. *See* David P. Leonard, *Codifying a Privilege For Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 119 n.25 (1988) (stating that only Maryland and Oregon lack statutes providing civil immunity or privilege protection for medical peer review proceedings).

172. *See, e.g., In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992) (upholding a magistrate’s application of the privilege to protect an internal review conducted by an accounting firm, but observing that to determine whether the privilege applies, the court must balance the interest in confidential self-analysis against the need for discovery); *Aleman v. Bonnstetter*, No. 89 C 2480, 1991 WL 32757, at *2 (N.D. Ill. Mar. 6, 1991) (recognizing that a qualified privilege exists for confidential evaluations by institutions performing a function essential to health and safety, and holding that this privilege protected police records concerning the need for psychological treatment of officers alleged to have used excessive force (citing *Urseth v. City of Dayton*, 653 F. Supp. 1057, 1059 (S.D. Ohio 1986))); *see also supra* note 170 and accompanying text.

173. Mary Ellen Kris & Gail L. Vannelli, *Today’s Criminal Environmental Enforcement Program: Why You May be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit*, 16 COLUM. J. ENVTL. L. 227, 248 (1991) (quoting Edmund B. Frost & Stephanie Siegel, *Environmental Audits: How to Protect Them From Disclosure*, 5 Toxics L. Rep. (BNA) No. 38, 1211, at 1214 (Feb. 27, 1991)).

174. *See id.* at 248; *see also* *United States v. Gillock*, 445 U.S. 360, 367 (1980) (discussing the legislative history of congressional intent of Federal Rule of Evidence 501); *Trammel v. United States*, 445 U.S. 40, 47 (1980) (stating that the congressional intent for

In contexts other than the medical malpractice setting, however, numerous courts have questioned the privilege,¹⁷⁵ frequently relying on *United States v. Nixon*,¹⁷⁶ in which the Supreme Court observed that privileges are not to be "lightly created nor expansively construed."¹⁷⁷ Nonetheless, most frequently, rather than explicitly denouncing the self-evaluative privilege, courts that have been hesitant to apply the privilege simply have found that the privilege is not applicable in the circumstances at issue without rejecting the privilege itself. For example, in *Dowling v. American Hawaii Cruises, Inc.*,¹⁷⁸ the Ninth Circuit noted that the Supreme Court and the circuit courts have not "definitively denied the existence" of the privilege, though they have not accepted nor defined its scope either.¹⁷⁹ Rather, they have simply refused to apply the privilege, relying on narrow distinctions¹⁸⁰ regarding the policies that recognition of

enacting Federal Rule of Evidence 501 "was to 'provide the courts with flexibility to develop rules of privilege on a case-by-case basis' " (quoting 120 CONG. REC. H40,891 (daily ed. Dec. 18, 1974) (statement of Representative Hungate)).

175. See *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (holding that the privilege does not apply to peer review materials in a discrimination case); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 908 (2d Cir. 1982) (refusing to apply the privilege to information regarding a tenure committee's votes in an academic tenure determination); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 667 (4th Cir. 1977) (holding that equal opportunity reports, compiled and submitted by a private company to a government agency in compliance with the requirements of the Civil Rights Act, are not protected by the privilege); *Etienne v. Mitre Corp.*, 146 F.R.D. 145, 148 (E.D. Va. 1993) (holding that the privilege does not apply to results of an employer's studies regarding its compliance with equal employment opportunity laws in the context of an employment discrimination suit); *In re Salomon Inc. Sec. Litig.*, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,254 (S.D.N.Y. Nov. 12, 1992) (recognizing the privilege, but finding it inapplicable to preclude production of management control and internal audit studies); *Martin v. Potomac Elec. Power Co.*, 58 Fair Empl. Prac. Cas. (BNA) 355, at 360-61 (D.D.C. May 25, 1990) (addressing solely the issue of whether the self-critical analysis privilege applies to documents in an employment discrimination case and ultimately denying protection); *Skibo v. City of New York*, 109 F.R.D. 58, 63-64 (E.D.N.Y. 1985) (disallowing the privilege with respect to documents created in the context of an internal police investigation); *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706 (S.D.N.Y. 1983) (holding a news bureau may not invoke the privilege when bureau has not treated an internal self-analysis as confidential and has made public statements citing to the report).

176. 418 U.S. 683 (1974); see *Robinson v. Magovern*, 83 F.R.D. 79, 86 (W.D. Pa. 1979) (citing *United States v. Nixon* for the proposition that the self-evaluative privilege is disfavored when other values are at stake).

177. *Nixon*, 418 U.S. at 710.

178. 971 F.2d 423 (9th Cir. 1992).

179. *Id.* at 425 n.1 (citing *University of Pa.*, 493 U.S. at 188-95).

180. See *id.* at 427 (rejecting the self-evaluative privilege with respect to "routine pre-accident safety reviews," despite existence of a privilege with respect to "post-accident investigations"). Similarly, in *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985), the court noted, in the context of a racial discrimination action, "[t]he prevailing view is that self-critical portions of affirmative action plans are privileged and not subject to discovery." *Id.* The court stated that the privilege's bounds must be determined on a

the privilege will serve under the circumstances. The Ninth Circuit followed suit, declining to apply the privilege to the voluntary, routine safety reviews that were at issue in *Dowling*.¹⁸¹ The Ninth Circuit refused to rule expressly on whether and to what extent a self-evaluative privilege exists.¹⁸² Thus, the viability of the self-evaluative privilege remained open to question.

Additionally, a number of courts that have addressed the privilege have restricted its scope, finding that the self-evaluative privilege does not protect documents sought by the government for the purpose of enforcing regulations. In *Federal Trade Commission v. TRW, Inc.*,¹⁸³ the District of Columbia Circuit adopted an exception to the self-evaluative privilege when the government is the party seeking disclosure of documents.¹⁸⁴ In *TRW*, pursuant to the authority granted to it by the Fair Credit Reporting Act, the Federal Trade Commission (FTC) initiated an investigation of TRW in response to consumer complaints and issued a

case-by-case basis, however, and avoided deciding the applicability of the privilege in the case at hand, finding that the defendants' voluntary use of their affirmative action plans to prove nondiscrimination had waived whatever privilege may have existed. *See id.* at 552; *see also University of Pa.*, 493 U.S. at 188, 194-95 (declining to create a privilege to protect peer review materials relevant to discrimination charges in tenure decision from the EEOC, and focusing on the policy ramifications of recognizing a privilege in this instance, rather than on the existence or non-existence of the privilege itself); *In re Burlington Northern, Inc.*, 679 F.2d 762, 767 (8th Cir. 1982) (refusing to grant audit of mandamus when the district court judge held that employees' deposition answers were not subject to the self-critical analysis privilege in an employment discrimination case on grounds that the circumstances were unextraordinary); *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1062-63 (7th Cir. 1981) (refusing to apply the privilege to peer review materials in a doctor's anti-trust action against a hospital on the grounds that the plaintiff's claim arose out of the peer review process itself, not an independent occurrence as in a malpractice action, and that the strong public interest in enforcement of federal antitrust laws outweighed the hospital's interest in maintaining confidentiality). These inconsistencies in application of the self-evaluative privilege have led at least one commentator to criticize the privilege as an "homomorphic" exercise in discretionary protection, with "different and unrelated circumstances lead[ing] to the same result." Flanagan, *supra* note 160, at 576.

181. *Dowling*, 971 F.2d at 426. Expanding on the criteria set out in *Bredice*, the *Dowling* court adopted four criteria:

[F]irst, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed. To these requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential.

Id. (citations omitted).

182. *See id.*

183. 628 F.2d 207 (D.C. Cir. 1980).

184. *See id.* at 210-11.

subpoena of duces tecum to compel the production of documents.¹⁸⁵ TRW sought to apply the self-evaluative privilege to avoid the production of documents created as part of its National Consumer Relations Audit.¹⁸⁶ Declining to apply the privilege, the court stated the exception for government agencies with overwhelming clarity:

"Whatever may be the status of the 'self-evaluative' privilege in the context of private litigation, courts with apparent uniformity have refused its application where, as here, the documents in question have been sought by a governmental agency."¹⁸⁷

The TRW court went on to reason that the self-evaluative privilege was rooted in protecting the public interest. It further reasoned that where, as in the case at hand, the government seeks disclosure of documents, the public interest in expeditious agency investigations outweighs the countervailing interest in confidential self-analysis.¹⁸⁸ The District of Columbia Circuit thus followed the Second Circuit's decision in *United States v. Noall*,¹⁸⁹ a case in which the court held the self-evaluative privilege inapplicable in response to an order by the Internal Revenue Service (IRS) to provide documents.¹⁹⁰ Analogously to the *Noall* court's focus on the IRS's broad discretion, the TRW court relied on the broad investigatory powers that Congress had granted to the FTC.¹⁹¹ The TRW court quoted *Noall* for the proposition that the court has less discretion to apply the self-evaluative privilege in situations in which government agencies have exercised their broad investigatory powers than in the normal course of

185. See *id.* at 209.

186. See *id.* at 209-10.

187. *Id.* at 210. See, e.g., *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979) (rejecting self-evaluative privilege as a ground for enjoining exchange of government contractors' affirmative action reports between the EEOC and the Department of Labor because the reports were not prepared solely for internal use, and further noting that the rationale for applying the privilege was not as strong because the documents were disclosed only to federal agencies and not to third parties); *United States v. Noall*, 587 F.2d 123, 126 (2d Cir. 1978) (stating that cases that have found that internal reports were privileged were inapplicable in an action for enforcement of the tax laws because Congress clearly had delineated the Internal Revenue Service's right to obtain documents); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 667 (4th Cir. 1977) (holding self-evaluative privilege did not protect the Department of Labor's affirmative action reports from disclosure to EEOC, since the reports were not prepared solely for internal use and the regulation requiring the reports placed Reynolds on notice that they would be used in the administration of civil rights laws).

188. See TRW, 628 F.2d at 210-11.

189. 587 F.2d 123 (2d Cir. 1978).

190. See *id.* at 126 (holding that the self-evaluative privilege was inapplicable in the context of an order from the IRS to produce documents for examination).

191. See TRW, 628 F.2d at 211 (noting that the FTC's broad statutory authority furnished an "independent" reason to refuse to apply the self-evaluative privilege).

discovery under the Federal Rules of Civil Procedure, where judges have substantial discretion.¹⁹²

2. *The Self-Evaluative Privilege and the Environmental Audit*

a. *Dexter Court Held Exception to Privilege for Government Inquiries Barred Its Application*

Undoubtedly, the exception to the privilege for government inquiries is the single greatest barrier to a company's ability to rely on the self-evaluative privilege to protect disclosure in environmental audits. This exception leaves the environmental audit accessible to the government when it seeks to enforce environmental regulations or impose penalties. Until 1994, this restriction on the use of the privilege resulted in a finding that the self-evaluative privilege did not apply in the one federal environmental case that had raised the question. In *United States v. Dexter Corp.*,¹⁹³ the court held that "the 'self-evaluative privilege' does not have 'any application in an action brought by the government pursuant to the Clean Water Act.'"¹⁹⁴ The court based its holding on application of the government agency exception to the privilege.¹⁹⁵

Although the *Dexter* court recognized that the privilege has been recognized in a variety of situations where confidentiality is essential to the free flow of information, which in turn is essential to promote the public interest,¹⁹⁶ it found determinative the cases that have refused to apply the doctrine when a government agency seeks documents.¹⁹⁷ The court reasoned that the self-evaluative privilege is based on promotion of the public interest.¹⁹⁸ Thus, once Congress has authorized the government to act

192. *See id.*

193. 132 F.R.D. 8 (D. Conn. 1990).

194. *Id.* at 8 (reaffirming its earlier opinion upholding a magistrate judge's opinion and quoting the magistrate's opinion).

195. *See id.* at 9.

196. *See O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218 (D. Mass. 1980) (holding that a company's self-critical documents concerning corporate personnel policy were entitled to the protection of the privilege in order to promote the public interest in fair employment practices); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970) (holding that self-evaluative reports by hospital staff were entitled to the privilege in order to further the unimpeded flow of ideas and advice), *aff'd*, 479 F.2d 920 (1973); *Richards v. Maine Cent. R.R.*, 21 F.R.D. 590, 592 (D. Me. 1957) (holding that a railroad company's investigation of an accident was entitled to the protection of the privilege due to the public interest in promoting railroad safety).

197. *See Dexter*, 132 F.R.D. at 9; *Federal Trade Comm'n v. TRW*, 628 F.2d 207, 210 (D.C. Cir. 1980); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979); *United States v. Noall*, 587 F.2d 123, 124 (2d Cir. 1978); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 667 (4th Cir. 1977).

198. *See Dexter*, 132 F.R.D. at 9.

to enforce the laws, the *Dexter* court concluded, what Congress has declared to be in the public interest should be the paramount consideration.¹⁹⁹ Accordingly, the court found that, because Congress declared that the EPA should enforce the Clean Water Act and that application of the self-evaluative privilege would impede the EPA's ability to enforce the Clean Water Act, the self-evaluative privilege should not apply.²⁰⁰

b. What Room Is Left for Application of the Privilege Outside the Government Investigation Context?

There may be several ways for a company seeking protection for an environmental audit to circumvent the *TRW* and *Dexter* decisions in the context of civil litigation, however. Obviously, private party actions can be distinguished on the ground that no government enforcement is involved. Relying on *TRW*'s reasoning that there is more leeway for the courts to apply the privilege in civil litigation under the Federal Rules of Civil Procedure than in a government investigation,²⁰¹ even defendants in civil liability cases where the government is the plaintiff may be able to invoke the privilege. Such parties may argue that the reasoning of *TRW* is inapplicable because the question of privilege arose in the normal course of discovery under the Federal Rules of Civil Procedure, rather than in an agency effort to investigate and thereby enforce regulations. Moreover, in cases involving sites that have discontinued operations posing a danger to the surrounding community, a defendant could argue that the public interest in allowing corporations as a whole to confidentially review and remediate their environmental problems outweighs the public interest in allowing the government to prosecute all environmental liability claims expeditiously.²⁰²

These possibilities for the recognition of the self-evaluative privilege are raised in *Reichhold Chemicals, Inc. v. Textron, Inc.*²⁰³ Here the court held that a private plaintiff's retrospective analysis of past environmental practices for the purpose of frank self-evaluation and analysis of the

199. *See id.*

200. *See id.* at 9-10.

201. *See supra* notes 186-87 and accompanying text.

202. At least one commentator has criticized *Dexter*'s deference to government agencies as going too far in delegating a judicial function to the legislative branch. *See O'Reilly, supra* note 2, at 149. In light of the judicial support for a government agency exception to the self-evaluative privilege and the extensive delegation to EPA under the federal environmental statutes, it is unlikely that an attack on *Dexter* arguing an unlawful delegation theory would have much success. *See Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 42 U.S.C. § 9604 (1994) (delegating broad authority to EPA for remedy selection).

203. 157 F.R.D. 522, 526 (N.D. Fla. 1994).

source and effect of prior pollution, as well as for analysis of plaintiff's possible role in the pollution, was privileged.²⁰⁴

In 1984, plaintiff Reichhold Chemicals, Inc. (Reichhold) entered into a Consent Order with the Florida Department of Environmental Regulation obligating Reichhold to undertake a variety of measures to investigate and remediate contamination of groundwater and storm water runoff from its industrial plant site in Pensacola, Florida.²⁰⁵ Subsequently, in 1992, Reichhold brought suit against eight defendants, several of whom were former owners of some portion of the site, to recover the costs incurred and anticipated in responding to the Consent Order.²⁰⁶ Reichhold made claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),²⁰⁷ various Florida statutes, and common-law theories of liability.²⁰⁸

The issue of self-evaluative privilege arose when, in a 1993 document production, Reichhold listed on its privilege log thirteen documents that it asserted were protected from disclosure solely on the basis of self-critical analysis.²⁰⁹ Reichhold moved for a protective order that the defendants opposed on two grounds.²¹⁰ First, the defendants urged the court to decline adoption of a self-evaluative privilege.²¹¹ Second, they argued that even if the privilege did apply to the federal claims, it should not be extended to state law claims because Florida had not recognized the self-evaluative privilege by statute or in its state courts.²¹²

After an *in camera* review of the documents in question, the court ruled that the self-evaluative privilege would apply to protect six of Reichhold's documents.²¹³ Ruling that the self-evaluative privilege applied as a matter of federal privilege law, the court also extended the privilege for purposes of the pendent state claims, following a number of federal courts that had held that federal privilege law governs the entire

204. *See id.* at 527.

205. *See id.* at 524.

206. *See id.*

207. *See id.*; *see also* 42 U.S.C. §§ 9607(a), 9613(f) (liability and contribution provisions respectively).

208. *See Reichhold*, 157 F.R.D. at 524.

209. *See id.* The court noted that additional documents were listed as protected by the self-critical analysis privilege, but also by the more traditional attorney-client and work-product privileges. *See id.* at 524 n.1.

210. *See id.* at 524.

211. *See id.*

212. *See id.*

213. *See id.* at 528.

case in a federal question case with pendent state claims,²¹⁴ and agreeing that to allow the defendant to obtain discovery for purposes of prosecuting some claims but not others was “‘unworkable.’”²¹⁵

As its basis for recognizing the self-evaluative privilege, the court observed that the privilege’s purpose is to protect parties from the “Hobson’s choice” between evaluating and correcting actual and potential environmental problems, and “thereby creating a self-incriminating record that may be evidence of liability” or intentionally refraining from creating a record and “possibly leaving the public exposed to danger.”²¹⁶ The court compared the self-critical analysis privilege to Federal Rule of Evidence 407, which excludes evidence of subsequent remedial measures based on similar reasons of public policy.²¹⁷

Applying these principles, the court looked to the decision of the former Fifth Circuit in *Southern Pacific Railway Co. v. Lanham*²¹⁸ as precedent for adopting a self-evaluative privilege.²¹⁹ The *Reichhold* court found that while the former Fifth Circuit had not recognized the self-evaluative privilege by name, its ruling that retrospective investigations of railroad accidents were immune from discovery on public policy grounds was not distinguishable from the self-critical analysis privilege that other courts later recognized.²²⁰

After recognizing the limits some courts placed on the privilege and the fact that some courts refused to recognize the privilege at all, the *Reichhold* court concluded that the public interest in “candid” assessment of compliance with environmental laws by corporations outweighed private litigants’ interests in discovering this “highly prejudicial, but minimally relevant evidence.”²²¹ Thus, the court held that retrospective self-assess-

214. *See id.* Indeed, the *Reichhold* court observed that the five circuit courts of appeal who had addressed the issue and a large number of trial courts had reached that conclusion. *See id.* (citing caselaw).

215. *Id.* (quoting *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982)). In addition, the court noted that, despite the defendants’ argument that a self-evaluative privilege was not available as a matter of law, it was not clear that the Florida state courts would not recognize the privilege. *See id.* The court observed that, although Florida courts cannot adopt new privileges by judicial decision, the Florida courts had adopted *Bredice* “not as a rule of privilege, but as a discretionary right of a court on grounds of public policy.” *Id.* (citing caselaw).

216. *Id.* at 524.

217. *See id.*

218. 403 F.2d 119, 131 (5th Cir. 1968).

219. *See Reichhold*, 157 F.R.D. at 525.

220. *See id.*

221. *Id.* at 526.

ment of compliance with environmental regulations "should be privileged in appropriate cases."²²²

The *Reichhold* court, however, distinguished application of the privilege for post-accident retrospective analysis from the case where an actor prospectively investigated and, having actual prior knowledge of a risk of harm, deliberately chose not to act.²²³ The court thus concluded that the public interest only favors privilege protection of retrospective analysis.²²⁴ Despite this limitation in the only case to recognize an environmental audit privilege in the federal courts, an argument could still be made, based on most of the reasoning in *Reichhold*, that privilege should extend to prospective investigation *if* the company shows during *in camera* review that adequate efforts were made promptly to correct any non-compliance discovered. The policy reasons for such a position are evidenced by the inclusion of similar provisions in many of the state environmental audit privilege statutes.²²⁵

222. *Id.*

223. *See id.* at 527.

224. *See id.*

225. *See supra* notes 62-64 and accompanying text. In *Koppers Co. v. Aetna Cas. and Sur. Co.*, 847 F. Supp. 360 (W.D. Pa.), *vacated*, 40 F.3d 1240 (3d Cir. 1994), a decision with limited precedential value in light of its subsequent history, but distinguished in *Reichhold*, the court declined to extend privilege protection to preoccurrence reports in the context of a suit by insureds seeking coverage from insurers for environmental liability. *See id.* at 364. Although the *Reichhold* court focused on the fact that preoccurrence reports were involved to distinguish *Koppers*, the *Koppers* court made the much broader ruling that "the self-evaluation privilege does not apply *a fortiori* to environmental reports, records, and memoranda," and disagreed that a corporation would face a Hobson's choice between due diligence and self-incrimination. *Id.* The *Koppers* court's reasoning, however, appears to be based on a theory that all environmental violations are intentional and knowing. The situation in which a privilege for self-evaluative audits is valuable occurs when incentives are needed to encourage investigations to determine if any inadvertent violations, or violations not known to management, are lurking. When an environmental audit privilege is considered in the latter context—the more common context for the environmental audit privilege to be at issue—the *Koppers* court's first reasoning is inapplicable. *See O'Reilly, supra* note 2, at 122 (noting that "a 'failure' found in an audit is less likely to be an illegal dumping, and more likely to be the result of the complexity of today's paper-laden compliance standards").

As a second basis for its ruling in its rather limited analysis of the self-evaluative privilege, the *Koppers* court stated that the "public need for disclosure of documents relating to environmental pollution and the circumstances of such pollution outweighs the public's need for confidentiality in such documents." *Koppers*, 847 F. Supp. at 364-65 (quoting *CPC Int'l, Inc. v. Hartford Accident and Indem. Co.*, 620 A.2d 462 (1992)). With this approach, the court focused only on the need for protection of the public from pollution, but did not consider the possibly more beneficial, but indirect, effect of promoting self-evaluation through protection of audit confidentiality, thereby possibly encouraging greater self-policing by industry.

c. *How to Maximize the Chance That an Environmental Audit Will Be Protected*

Reichhold provides some arguments for a self-evaluative privilege, but the trend of authority indicates a likelihood that courts may find that any given case is one of many circumstances where the self-evaluative privilege, if any exists, is not applicable.²²⁶ In order for the self-evaluative privilege to be an effective tool to carry out its policy goal of encouraging companies to invest time and effort in performing audits, it must become a predictable privilege that companies can count on to protect them from the risk that environmental audits could later be disclosed in litigation.²²⁷

In the meantime, the body of law surrounding the privilege has developed enough that if a company finds its audit materials potentially at issue in litigation, it makes sense to assert the privilege, although there is certainly no guarantee of success. Several steps are recommended for companies to increase the likelihood that an audit will be protected:

[Ensure that all audit material] 1) is prepared with an eye toward furthering the public interest and with a statement regarding the company's environmental policy, 2) conforms with and advances internal corporate policy, as well as applicable federal, state and local laws, 3) is held strictly confidential, 4) is written to reflect the internal, self-evaluation and self-analytical nature of the process, and 5) is prepared so that the factual and evaluation portions can be separated.²²⁸

These steps are aimed at furthering the policy underlying the self-evaluative privilege of encouraging candid and critical self-analysis that in turn furthers correction of a situation that could prove dangerous to the public.

IV. THE EPA'S POLICY

In stark contrast to the privilege expansion recognized by state legislatures and developing in the federal courts, in a Final Policy signed on December 18, 1995, and effective January 22, 1996, the EPA confirmed

226. The uncertainty of the privilege's applicability has been illustrated in the securities law arena. For example, in 1992, a judge in the Southern District of New York rejected the privilege. See *In re Salomon Sec. Litig.*, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97, 254 (S.D.N.Y. Nov. 12, 1992). In the same year, a judge in the Eastern District of New York applied the privilege. See *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992).

227. See Joseph E. Murphy & Roselee M. Oyer, *Securities Litigation: The Self-Evaluative Privilege & Beyond*, INSIGHTS, Mar. 11, 1993, at 11, 12.

228. See Kris & Vannelli, *supra* note 173, at 249 (citing Frost & Siegel, *supra* note 173).

that it would not recognize a privilege for environmental audits.²²⁹ The agency stated that it “firmly opposed” a statutory environmental audit privilege because “[p]rivilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry’s ability to self-police.”²³⁰ The EPA further reasoned that no privilege is necessary because the agency rarely uses audit reports as evidence and because surveys demonstrate that more companies now are auditing without the need for the “stimulus” of a privilege.²³¹ Finally, the EPA expressed concern that a privilege would “invite” industry defendants to claim the privilege with respect to nearly any evidence the government needed to establish violations, ultimately breeding more litigation to determine the scope of the privilege.²³²

Although the EPA declined to recognize a privilege, it did recognize the value of audits in uncovering environmental problems.²³³ Accordingly, the agency’s policy recognizes the need to provide some benefit or encouragement to companies who “self-police” by establishing criteria for the EPA to reduce or eliminate punitive civil fines and criminal prosecutions if violations uncovered in an audit are voluntarily reported and

229. See EPA Final Policy, *supra* note 2, at 66,710. The EPA confirmed the view it initially expressed in an interim policy issued on April 3, 1995. See Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875, 16,878 (1986).

230. EPA Final Policy, *supra* note 2, at 66,710.

231. See *id.* The EPA cites a 1995 Price-Waterhouse survey as indicating that industry respondents who did not conduct environmental audits ranked confidentiality as one of the least important factors in their decisions. See *id.* at 66,707.

232. See *id.* at 67,710.

233. See *id.* at 66,706. In 1986, the EPA announced its intention to encourage voluntary environmental audits and to refrain from *routinely* requesting environmental audit reports, after initial consideration of requiring mandatory auditing programs and certification of compliance through external auditors. See Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986). It was not always clear, however, that the EPA would approve the present path of voluntary audits free from heavy regulation that currently exists and precipitates the privilege issue. Indeed, the EPA’s policy is entitled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” and is described as a “policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover and disclose and correct violations of environmental requirements.” EPA Final Policy, *supra* note 2, at 66,706.

The EPA’s Final Policy on self-policing was the culmination of an approximately eighteen-month period during which the agency evaluated the need for incentives to encourage voluntary disclosure and correction of violations discovered through environmental audits. See *id.* During a two-day public meeting held in July, 1994, the EPA considered testimony of interested parties, including industry representatives, state environmental enforcement officials, and professional environmental auditors. See *id.* The agency also examined other federal and state policies on auditing and self-policing. See *id.* It then announced an interim policy on which comments were accepted and reviewed. See *id.*

promptly corrected.²³⁴ Specifically, in section D, the EPA's policy states that where violations are found through voluntary environmental "audits or compliance management systems that demonstrate due diligence," and where the violations "are promptly disclosed and expeditiously corrected, the agency will not seek punitive penalties and will generally not recommend criminal prosecution against the regulated entity."²³⁵

Despite section D's guidelines for penalty reduction, the policy provides that the EPA will seek fines designed to offset any economic benefit gained from violations.²³⁶ The EPA also endeavors to avoid abuse of the

234. See EPA Final Policy, *supra* note 2, at 66,706.

235. *Id.* at 66,707, 66,711. Additionally, the EPA's Final Policy provides for reducing gravity-based penalties by 75% for violations that are voluntarily and promptly disclosed and corrected, regardless of whether such violations were identified through formal audits or due diligence constituting a systematic compliance program. See *id.* at 66,707. Gravity based penalties are defined in section B of the policy as the punitive portion of the penalty that is over and above penalties representing a defendant's economic gain from non-compliance. See *id.* at 66,711. Section D of the Statement of Policy specifically lists the requirements for qualifying for penalty reductions as including nine elements: (1) Systematic discovery through an environmental audit or an objective, documented, auditing procedure reflecting the entity's regular practice of due diligence; (2) Voluntary discovery, rather than discovery through monitoring or sampling required by regulations; (3) Prompt disclosure within ten days after discovery of the violation or less if provided for by a specific law; (4) Discovery and disclosure made independently of and prior to any investigation by the government or a third party plaintiff; (5) Correction and remediation of the violation within sixty days, unless notice is given to EPA within sixty days that a longer time is needed; (6) Agreement in writing that the regulated entity will take steps to prevent reoccurrence, which may include improvement of its auditing system; (7) No previous violations of the same specific nature or closely related violations occurring within three prior years at the same facility, and no pattern of violations by the facility's parent organization within the past five years; (8) Violations that resulted in serious actual harm, that present an imminent or substantial danger to human health or the environment, or that violated the terms of a judicial order, an administrative order, or a consent decree are excluded; (9) Cooperation by the regulated entity as EPA dictates and deems necessary to determine applicability of penalty reduction, including providing documents and access to employees. See *id.* at 66,711-66,712. Penalty reduction, but not elimination, is available if an entity satisfies items two through nine, but does not satisfy the first requirement of a systematic program of compliance. See *id.* at 66,707, 66,711. In addition to the penalty reduction provided in the Final Policy, the EPA also provided for further penalty reductions for small businesses, of 100 or fewer employees, as part of its small business compliance policy. That policy provides that no gravity-based penalties will be assessed against small businesses if there is compliance with four criteria: (1) the company must demonstrate good faith effort to be in compliance by receiving on-site compliance assistance or by undertaking a voluntary self-audit, (2) the company must have no prior violations of the requirement at issue, (3) the violation must be corrected in 180 days, and (4) the violation must not represent criminal misconduct or present an imminent or substantiated endangerment to human health or the environment. See *EPA Expands Small Business Compliance Policy to Cover Self-Audits*, 17 Inside EPA Wkly. Rep., No. 22, at 6-7 (May 31, 1996).

236. See EPA Final Policy, *supra* note 2, at 66,707, 66,712. EPA expressed two reasons for retaining the right to recover economic benefits: "[first], it provides an incentive to comply on time . . . [and] [second] . . . it protects responsible companies from being under-

voluntary disclosure mechanism by providing that “[r]epeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief.”²³⁷ Additionally, criminal liability for conscious disregard of legal obligations remains in place, with the EPA emphasizing that its penalty reductions are “limited to good actors.”²³⁸

In response to concerns that audits may be used unfairly in environmental enforcement, the agency stated that it will not routinely request audit reports from companies.²³⁹ Rather, the EPA affirmed that, as a rule, it will not recommend criminal prosecution of a company or individual who voluntarily has disclosed noncompliance or violations discovered through an audit, so long as the regulated entity made the disclosures before the government initiated an investigation.²⁴⁰ Thus, the EPA asserts that it will not recommend criminal prosecution if a regulated entity “uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.”²⁴¹ If, however, the EPA has “independent evidence of a violation” it may request further information in order to establish the “extent and nature of the problem and the degree of culpability.”²⁴²

Like several states that have imposed temporal limits on their environmental audit statutes, the EPA recognized that experience will be the best test of its policy, and plans to conduct a study within three years of promulgation of this policy to determine its effectiveness.²⁴³

A. Effect on State Audit Privilege Laws

1. EPA's Position as Expressed in Its Final Policy

In its Final Policy, the EPA encouraged states to experiment with different methods of ensuring environmental compliance, but cautioned that state efforts should not “jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or

cut by their noncomplying competitors.” *Id.* at 66,707. The policy, however, does not set forth standards for measuring such economic benefits.

237. *Id.* at 66,706. Thus, in accordance with this purpose of not permitting promotion of audits to interfere with clean-up of the environment, the policy does not affect calculation of cleanup costs, remedial costs, natural resource damages, or emergency response costs associated with a violation.

238. *Id.* at 66,707.

239. *See id.*

240. *See id.*

241. *Id.*

242. *Id.* at 66,708.

243. *See id.* at 66,712.

the environment, or make it profitable not to comply.”²⁴⁴ Warning that states with audit privilege laws may not meet this requirement, the agency “reserve[d] its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors.”²⁴⁵ Thus, state statutes creating an environmental audit privilege may not protect companies in all cases, such as when the EPA finds that a state statute frustrates federal environmental policy.

2. *EPA Actions Since the Final Policy Opposing Existing State Legislation*

Since its Final Policy became effective, the EPA’s concern that state audit privilege and penalty immunity laws not impede enforcement of federal environmental laws has led to controversy involving the federal environmental statutes’ delegation of authority to states that have enacted audit protection laws. Most notably, the issue has come to the forefront in Idaho where EPA Region X announced a decision on October 27, 1995, which cited Idaho’s state immunity law as a reason for rejecting the state’s air operating permit program.²⁴⁶ Following the Region X announcement, a number of EPA regional offices revisited their decisions to approve Clean Air Act operating permit programs in states with strong audit protection laws.²⁴⁷

Region X’s concern, specifically, was that the state law, providing state immunity from civil or criminal liability for violations voluntarily disclosed by the source to the state, “would ‘impermissibly interfere with Idaho’s enforcement requirements.’”²⁴⁸ In this context, the EPA conditioned final approval on the state “either changing its immunity law or demonstrating why the program would not undercut the state’s enforcement authority.”²⁴⁹ Although the EPA ultimately approved the state permit programs on an interim basis and deferred the audit privilege and immunity law issue until it could be considered during final program ap-

244. *Id.* at 66,710.

245. *Id.*

246. See *EPA Considers Blocking Air Permit Delegation to States with Audit Laws*, 17 *Inside EPA Wkly. Rep.*, No. 11, at 6 (Mar. 15, 1996).

247. See *id.*

248. *Id.* (quoting statements of the EPA Region X spokesperson).

249. *Id.*

proval, the agency has continued to oppose the breadth of the Idaho law.²⁵⁰

For example, the EPA published a memorandum establishing criteria for approvals under Title V of the Clean Air Act, aimed at clarifying the circumstances under which state audit immunity and privilege laws would deprive a state of the authority to implement operating permit programs under Title V.²⁵¹ The EPA's guidance document indicates that responsibility can still be delegated to states with audit privilege and immunity laws, provided that the EPA determines that the state's permit program meets minimum federal standards and provides guidelines for such determination to be made on a case-by-case basis in light of the wide variation of state statutes.²⁵² Accordingly, the possibility remains that the EPA will remove state authority and control in administering federal statutes if it is sufficiently concerned that the breadth of a state's environmental audit law will impede the state's enforcement capabilities.

3. *EPA Efforts to Discourage Additional State Legislation*

Since enactment of the Final Policy, the EPA also has discouraged enactment of environmental audit protection laws in other states. For example, when New Hampshire's aggressive environmental audit privilege bill was in the final stages of the legislative process, the EPA's Region I Administrator sent a letter to New Hampshire's governor expressing the agency's opposition and requesting that the state amend the legislation so that it would not "apply to federally delegated programs with more stringent federal requirements."²⁵³ Similarly, the EPA notified Virginia that there would be increased federal enforcement in the state if Virginia constrained enforcement efforts with its proposed audit privilege and penalty immunity statute.²⁵⁴ This instance of EPA intimidation of the states occurred before the agency's policy became final.

250. See *EPA to Approve 'Interim' Permit Programs Despite Audit Privilege Laws*, 17 Inside EPA Wkly. Rep., No. 14, at 1, 6 (Apr. 5, 1996).

251. See *EPA Memo Establishing Criteria for Title V Approvals*, 17 Inside EPA Wkly. Rep., No. 15, at 5 (Apr. 12, 1996).

252. See *id.*

253. *EPA Considers Blocking Air Permit Delegation to States With Audit Laws*, *supra* note 246, at 6. The air operating permit program under Title V of the Clean Air Act has become the focus of EPA's interest in this area because it is the only major media program that has not already been broadly delegated to the states. See *id.*

254. Broderick, *supra* note 11, at 810-11 (reporting comments of state lawmakers' group).

4. *Impact of EPA Efforts to Discourage Privilege Expansion*

The EPA Assistant Administrator for Enforcement and Compliance Assistance, Steven Herman, has expressed the view that the EPA's Final Policy has "stopped the steamroller" of state privilege legislation and placed in check the tendency in the states toward adopting privilege legislation.²⁵⁵ Nonetheless, in the months after the EPA's Final Policy became effective, several states, including New Hampshire, enacted laws that provide an environmental audit privilege and/or some form of penalty immunity for violations discovered through an audit and voluntarily disclosed.²⁵⁶

California, however, has acted largely in line with the EPA's position, responding to the agency's policy on environmental audits and voluntary disclosure of violations with a draft policy that expanded and clarified the federal policy.²⁵⁷ California's draft policy lists the same conditions as the federal policy that a regulated entity must meet to gain a reduction or total elimination of penalties.²⁵⁸ Expansions in the California policy, however, include a further penalty reduction for investments in pollution prevention programs, as well as more willingness to offer penalty reductions for violations voluntarily revealed.²⁵⁹ California's policy is in at least one respect potentially more stringent than the federal policy: it has expanded the categories of cases in which the agency reserves its right to refer the case for criminal prosecution.²⁶⁰ Under the EPA's policy, cases can be referred for criminal prosecution where " 'high-level corporate officials or managers were consciously involved or willfully blind to the violations,' " ²⁶¹ whereas under California's policy, the right to refer cases for

255. See Hogue, *supra* note 8, at 573-74 (quoting remarks of Steven Herman). Another source reports that in 1995, while EPA was receiving comments on its audit policy, seven states considered and rejected audit privilege statutes, including Georgia, Hawaii, Iowa, Maryland, Missouri, Montana, and West Virginia. See Cheryl Hogue & Kurt Fernandez, *Number of States With Laws Granting Audit Privilege Grows to 14 With Texas*, 19 Chem. Reg. Rep. (BNA) No. 9, at 236 (June 2, 1995).

256. See 1996 N.H. Adv. Legis. Serv. 10, 12, 14-15 (Michie) (to be codified at N.H. REV. STAT. ANN. §§ 147-E:3, 147-E:9).

257. See *California Unveils Draft Policy that Expands on EPA Audit Approach*, 19 Chem. Reg. Rptr. (BNA) No. 46, at 1351 (Feb. 23, 1996).

258. See *id.* Like the federal EPA, California's EPA will reduce or eliminate penalties where the violation is the result of an environmental audit or other objective, documented, organized procedure or practice reflecting the facility's due diligence; the violation is identified voluntarily and promptly disclosed; and the violation is corrected as soon as possible and steps are taken to prevent reoccurrence. See *id.*

259. See *id.* (citing comments of Gerald G. Johnson, California EPA counsel and assistant secretary for law enforcement (Feb. 21, 1996)).

260. See *id.*

261. *Id.*

prosecution to is extended to situations in which “ ‘a management philosophy or practice . . . concealed or condoned the violation.’ ”²⁶²

B. Impact on the Burgeoning Self-Evaluative Privilege

The impact of the EPA's Final Policy on the judicial development of a self-evaluative privilege has yet to be demonstrated in the courts. It is quite possible that courts will look to EPA's policy in deciding whether a self-evaluative privilege should apply in the environmental context. The Final Policy's report of the EPA's reasons for its position, however, provides room for challenge to the policy reasons for not recognizing a privilege.

For example, in support of its opposition of a statutory evidentiary privilege for environmental audits, the EPA argued that privilege invites secrecy “instead of the openness needed to build public trust in industry's ability to self-police,”²⁶³ thus concluding that in the environmental context, a self-evaluative privilege would be contrary to, rather than in furtherance of, public policy. The EPA also argues that statistics show audit protection laws will not accomplish their intended goal of encouraging more environmental audits. The EPA relies on a 1995 Price Waterhouse survey that found “those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.”²⁶⁴ Those seeking to assert a self-evaluative privilege could attack the EPA's reasoning, however, with statistics countering the Price-Waterhouse survey on which the agency relies to establish that audit protection does in fact further voluntary compliance.

An additional factor that might persuade a court to disregard the agency's position is that the agency does not give a complete picture of the development of the self-evaluative privilege in the courts. The EPA cites *Dexter*, the only reported decision on the subject of the self-evaluative privilege in a suit by the government, for the proposition that “[f]ederal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations.”²⁶⁵ The EPA, however, does not mention the very recent growth of a privi-

262. *Id.*

263. EPA Final Policy, *supra* note 2, at 66,710 (quoting *United States v. Nixon*, 418 U.S. 683 (1974), for the proposition that because “they are in derogation of the search for truth,” privileges should not be created lightly).

264. *Id.*

265. *Id.* (citing *United States v. Dexter*, 132 F.R.D. 8 (D. Conn. 1990)); see *supra* notes 193-200 and accompanying text (discussing *Dexter* in detail).

lege's recognition in *Reichhold* and does not mention that court's approach to the privilege in the civil litigation context.²⁶⁶

Finally, even if the EPA's position discourages growth of a self-evaluative privilege in the courts, it expressly states only that it does not advocate creation of a statutory evidentiary privilege for environmental audits, not that its position in any way impacts existing common-law privileges. Accordingly, the agency arguably has left room for recognition of a self-evaluative privilege in the courts and clearly has left intact the availability of attorney-client privilege or the work-product doctrine to protect environmental audits where there is adequate attorney involvement.

V. CONCLUSION

The EPA's Final Policy opposing privilege expansion may have slowed the trend of privilege expansion, but it has by no means entirely stopped the wave. Although cases have not arisen in which courts have expanded the self-evaluative privilege for environmental audit materials in the recent months since the EPA announced its Final Policy, the policy by no means precludes expansion of common-law privilege to protect audit materials in the courts. Moreover, the legislative initiative continues to thrive, by all accounts, with bills still under consideration in Congress and some states already having enacted broad privilege protection and penalty immunity for environmental audits since the EPA's announcement of its Final Policy.

Nonetheless, privilege protection for environmental audits remains the exception to the rule, and, unless a federal law is enacted to spread uniformity, it will be years before environmental audit protection is broad enough to guarantee confidentiality in every forum—the circumstance needed to maximize the possibility of accomplishing the goal behind audit protection of achieving voluntary compliance through routine self-evaluation.

266. See *supra* notes 203-25 and accompanying text (discussing *Reichhold* in detail).